APPENDIX

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 733

PERMA LIFE MUFFLERS, INC.
PERMA LIFE MUFFLERS OF ARLINGTON, INC.
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.
PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.
ROBIN HOOD OF GRAND RAPIDS, INC.
ROBIN HOOD OF MUSKEGON, INC.
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a
ROBIN HOOD MUFFLER SHOP
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a
MIDAS MUFFLER SHOP OF BATTLE CREEK
CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS
PIERCE MUFFLER SHOPS, INC.

PETITIONERS

v.

INTERNATIONAL PARTS CORPORATION
MIDAS, INC.
POWELL MUFFLER CO. INC.
MUFFLER CORPORATION OF AMERICA
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,
ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FILED OCTOBER 17, 1967
CERTIORARI GRANTED JANUARY 15, 1968

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 733

PERMA LIFE MUFFLERS, INC.
PERMA LIFE MUFFLERS OF ARLINGTON, INC.
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.
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RESPONDENTS

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

NO. 15862

PERMA LIFE MUFFLERS, INC.; PERMA LIFE MUFFLERS OF ARLINGTON, INC.; PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.; PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA.; ROBIN HOOD OF GRAND RAPIDS, INC.; ROBIN HOOD OF MUSKEGON, INC.; REGINA M. ROSS, Assignee of MAXWELL E. ROSS t/a ROBIN HOOD MUFFLER SHOP; REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a MIDAS MUFFLER CLINIC OF MINNEAPOLIS; REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a MIDAS MUFFLER SHOP OF BATTLE CREEK; CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS and PIERCE MUFFLER SHOPS, INC.,

Plaintiffs-Appellants,

vs.

INTERNATIONAL PARTS CORPORATION; MIDAS, INC.; POWELL MUFFLER CO., INC.; MUFFLER CORPORATION OF AMERICA; NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER, ROBERT M. JACOB, HAROLD KRIEGER, and IRWIN LISS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

—

Honorable Abraham L. Marovitz, Judge Presiding.

DISTRICT COURT

DOCKET ENTRIES APPLICABLE TO APPEAL

1960	
Oct. 19	Complaint filed (R 8-36)
1961	
Feb. 8	Order amending paragraphs 16(G) and 41(G) of complaint (R 39-40)
Mar. 3	Answers of defendants filed (R 41-86)
Apr. 17-18	Deposition of Gordon Sherman taken by plaintiffs (240 pages)
May 16-17	Deposition of Gordon Sherman taken by plaintiffs (180 pages)
May 18	Deposition of Robert T. Schroeder taken by plaintiffs (99 pages)
June 16	Defendants filed motion to dismiss paragraphs 21, 24-28 and 31 of complaint (R 116-21)
Aug. 28-29	Deposition of Robert Jacob taken by plaintiffs (213 pages)
Aug. 30-31	Deposition of Harold B. Krieger taken by plaintiffs (186 pages)
Sept. 1	Deposition of Lou Gurnick taken by plaintiffs (118 pages)
Nov. 9	Plaintiffs filed amendments to complaint (R 153-58)
Nov. 20	Defendants filed motion to strike or dismiss plaintiffs' amendments to complaint (R 162-64)

Dec. 18	Order that plaintiffs amend certain paragraphs of complaint and that Count 4 is stricken (R 226-28)
1962	
Jan. 17	Plaintiff, B. Paul Morris, t/a Morris Muffler Shop, voluntarily dismissed complaint R (234-35)
Jan. 17	Plaintiffs filed amendments to complaint (R 229-33)
Jan. 29	Amendments to answers of defendants filed (R 236-41)
June 25-28	Deposition of Maxwell E. Ross taken by defendants (434 pages)
July 16-19	Deposition of Gregory T. Skarupa taken by defendants (323 pages)
Aug. 27-29	Deposition of Claude D. Wheeler taken by defendants (264 pages)
Sept. 24-27	Deposition of Joseph Pierce taken by defendants (355 pages)
Oct. 3	Plaintiffs served interrogatories upon defendants (R 242-58)
Nov. 12-15	Supplemental depositions of Ross, Skarupa, Wheeler and Pierce taken by defendants (229 pages)
Dec. 18	Defendants filed answers to certain of plaintiffs' interrogatories (R 288-308)
1963	
June 17	Defendants filed amended answer to plaintiffs' interrogatory 27 (R 325-29)

Sept. 26	Cause transferred to calendar of Judge Marovitz

1964

Feb. 11	Defendants filed interrogatories to all plaintiffs and interrogatories to each plaintiff (R 330-94)
Dec. 3	Defendants filed additional answer to plaintiffs' interrogatories (R 429-45)
Dec. 11	Plaintiff Skarupa filed answers to defendants' interrogatories (R 446-556)

1965

Feb. 15	Plaintiffs Pierce, Wheeler, Skarupa and Ross filed answers to defendants' interrogatories (R 577-1031)
Feb. 15	Defendants filed answers to certain of plaintiffs' interrogatories (R 1032-52)
June 30	Order that all discovery and pleadings be completed by Aug. 6, 1965. (R 1053)
July 29-30 Aug. 2	Plaintiffs Wheeler, Pierce and Ross filed additional answers to defendants' interrogatories. (R 1064-1113)
Aug. 2	Defendants filed motions for production of documents and to compel further answers to interrogatories and alternative motions for preclusion of evidence. (R 1114-28)
Aug. 6	Pretrial conference held; order that plaintiffs produce documents and further answer interrogatories and that defendants file motion for summary judgment by Oct. 18, 1965. (R. 1129-31)

Aug. 17	Plaintiffs filed supplemental answers to defendants' interrogatories (R 1132-39)
Oct. 18	Defendants filed motion for summary judgment with supporting brief, affidavit and appendix (R 1140-1233)
Dec. 6	Plaintiffs filed opposition to motion for summary judgment (R 1234-1312)
1966	
Jan. 5	Plaintiffs filed motion to strike paragraphs 1(b) and 3 of defendants' motion for summary judgment (R 1343-54)
Feb. 25	Memorandum opinion on defendants' motion for summary judgment and plaintiffs' motion to strike (R 1401-12)
Mar. 2	Order granting summary judgment and final judgment of dismissal on Counts 1 and 2 and denying summary judgment on Count 3 without prejudice to renew said motion after defendants further answer plaintiffs' interrogatories. (R 1414-16)
Mar. 10	Defendants filed answer to plaintiffs' interrogatory 34 (R 1417-21)
Mar. 11	Defendants filed renewed motion for summary judgment (R 1422-25)
Mar. 31	Plaintiffs filed opposition to defendants' renewed motion for summary judgment (R 1433-52)
May 20	Memorandum opinion on defendants' renewed motion for summary judgment (R 1494-1501)

May 24	Order granting summary judgment and final judgment of dismissal on Count 3 (R 1502-03)
June 17	Plaintiffs filed notice of appeal (R 1504-06)
June 24	Plaintiffs filed amended notice of appeal (R 1508-10)
Sept. 15	Record of District Court transmitted to Court of Appeals.

10 . COMPLAINT UNDER THE SHERMAN AND CLAYTON ACTS FOR TREBLE DAMAGES AND FOR OTHER RELIEF[1]

The plaintiffs above named bring this cause of action against the defendants above named, and complain and allege as follows:

JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court by Section 4 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes," as amended and supplemented (15 U.S.C. 15), said Act being commonly and sometimes hereinafter referred to as the Clayton Act, and by Section 1337 of Title 28 of the United States Code, for alleged violations of Section 1 of the Act of Congress of July 2, 1890, as amended and supplemented, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (15 U.S.C. 1), said Act being commonly and sometimes hereinafter referred to

[1] The Complaint, as finally amended, is set forth hereafter. Those portions of the original Complaint or amendments thereto which were deleted or subsequently amended by plaintiffs have not been included in this Appendix.

as the Sherman Act, and Sections 2 and 3 of the Clayton Act, aforesaid (15 U.S.C. 13, 14).

(Amendment filed Jan. 17, 1962)

229 Paragraph 1 of the complaint is amended by adding to that paragraph the following additional paragraphs:

"1A. Diversity of citizenship exists as between all of the Plaintiffs and all of the Defendants in that: Plaintiffs PERMA LIFE MUFFLERS, INC. is a corporation organized under the laws of the State of Maryland and having its principal office in the State of Maryland; Plaintiff PERMA LIFE MUFFLERS OF ARLINGTON, INC. is a corporation organized under the laws of the State of Virginia and having its principal place of business in the State of Virginia; Plaintiff PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC. is a corporation organized under the laws of the State of Maryland and having its principal place of business in the State of Maryland; Plaintiff PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC. is a corporation organized under the laws of the State of Virginia and having its principal place of business in the State of Virginia; Plaintiff ROBIN HOOD OF GRAND RAPIDS, INC. is a corporation organized under the laws of the State of Michigan and having its principal place of business in the State of Michigan; Plaintiff ROBIN HOOD OF MUSKEGON, INC. is a corporation organized under the laws of the State of Michigan and having its principal place of business in the State of Michigan; Plaintiff REGINA M. ROSS is a citizen of the State of Michigan; Plaintiff CLAUDE WHEELER is a citizen of the State of Missouri; Plaintiff B. PAUL MORRIS is a citizen of the State

of North Carolina; and Plaintiff PIERCE MUFFLER SHOPS, INC. is a corporation organized under the laws of the State of New York and having its principal place of business in the State of New York; whereas Defendants INTERNATIONAL PARTS CORPORATION, MIDAS, INC., POWELL MUFFLER CO., INC., MUFFLER CORPORATION OF AMERICA, NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER, ROBERT M. JACOB, HAROLD KRIEGER, and IRWIN LISS are citizens of the State of Illinois or corporations organized under the laws of the State of Illinois and having their principal place of business in the State of Illinois.

"1B. The amount of each Plaintiff's claim under Count Four hereof (Paragraph 21A), exclusive of interests and costs, exceeds the sum of $10,000.00."

(Original complaint continued)

10 2. Each of the defendants transacts business within the Northern District of Illinois and/or may be found herein, and the venue of this Court is thereby duly established.

DEFINITIONS

3. Whenever the term "automotive exhaust parts" is used herein, the term refers to some or all of the following: mufflers, true-tone mufflers, farm-tractor mufflers, tail pipes, tail-pipe elbows, straight tail-pipe tubing, flexible metal
11 tubing, tail-pipe slip connectors, exhaust pipes, tail-pipe hangers, adjustable pipe hangers, rubber shim assortments, saddle-type muffler clamps, full-circle muffler clamps, special-type muffler clamps, muffler hangers, muffler straps, muffler support straps, tail-pipe straps, muffler-reducing bushings, exhaust-pipe flange gaskets, exhaust-

flange gasket assortments, muffler and tail-pipe tools, cap screws, self-tapping screws, hexagon nuts, flat washers, lock washers, manifold brass nuts, manifold studs, stud and nut assortment, tail-pipe tips, exhaust extensions, dual-exhaust kits, and dual-installation kits.

4. Whenever the term "allied automobile products" is used herein, the term refers to automotive replacement parts other than automotive exhaust parts as defined herein, including but not limited to springs, shock absorbers, windshields, batteries, tires, oil filters, seat covers, and convertible tops.

5. Whenever the term "exclusive agreement(s)" or "standard-form exclusive agreement(s)" is used herein, said term refers to a contract and/or several of such contracts entitled "License and Sales Agreement(s)" between a plaintiff and/or plaintiffs herein, and/or others, and the defendant MIDAS, INC. All of such contracts were in force and/or effective during some part or all of the period November 22, 1955 to and including March 31, 1960. A copy of one form of this Exclusive Agreement is attached hereto and made a part hereof as "Exhibit A."

6. Whenever the term "contractee" is used herein, said term refers to the party to an exclusive agreement as defined herein other than the defendant MIDAS, INC.

7. The term "and/or" means "and" and, in the alternative, "or."

8. Acts alleged in this complaint to have been done by any corporate defendant(s) were authorized, ordered, and/or performed by officers, agents, servants, or employees of such corporate defendant(s).

DESCRIPTION OF THE DEFENDANTS

9. Each of the following individuals, firms, and/or corporations are made defendants herein and have businesses and/or may be found at the addresses set forth below:

Defendant and Address

(A) INTERNATIONAL PARTS CORPORATION [hereinafter "INTERNATIONAL"], an Illinois Corporation; 4101 West 42nd Place, Chicago, Illinois;

(B) MIDAS, INC. [hereinafter "MIDAS"], an Illinois corporation; 4101 West 42nd Place, Chicago, Illinois;

(C) POWELL MUFFLER CO., INC. [hereinafter "POWELL"], 42 West 42nd Place, Chicago, Illinois;

(D) MUFFLER CORPORATION OF AMERICA [hereinafter "MCA"], an Illinois corporation; 2501 West 24th Street, Chicago, Illinois;

(E) NATHAN SHERMAN, an individual; 4101 West 42nd Place, Chicago, Illinois;

(F) GORDON SHERMAN, an individual; 4101 West 42nd Place, Chicago, Illinois;

(G) ROBERT SCHROEDER, an individual; 4101 West 42nd Place, Chicago, Illinois;

(H) ROBERT M. JACOB, an individual; 4101 West 42nd Place, Chicago, Illinois;

(I) HAROLD KRIEGER, an individual; 4101 West 42nd Place, Chicago, Illinois;

(J) IRWIN LISS, an individual; 4101 West 42nd Place, Chicago, Illinois.

(Amendment filed on Aug. 13, 1965)

1130 Upon stipulation and agreement of counsel for all parties that subsequent to the filing of this action all of the corporate party defendants, pursuant to a plan of reorganization adopted by defendant International Parts Corporation, an Illinois corporation, and certain other corporations and individuals, were merged into or acquired by defendant International Parts Corporation, a Delaware corporation, and that subsequent to that merger International Parts Corporation, a Delaware corporation, by charter amendment changed its name to Midas-International Corporation, a Delaware corporation, that said Midas-International Corporation is hereby named as a party defendant in this action.

(Original complaint continued)

10. Each of the corporate defendants is engaged in the business of manufacturing for sale and/or purchasing for resale at wholesale automotive exhaust parts and/or allied automobile products, and each of the individual defendants is an officer and/or employee and/or agent of one or more of the corporate defendants herein.

11. On information and belief, plaintiffs aver that each of the defendants MIDAS, POWELL, and MCA is a wholly-owned subsidiary of the defendant INTER-
13 NATIONAL and/or that all of the issued and outstanding stock of these corporations is owned by the defendant INTERNATIONAL and/or officers and/or agents and/or nominees thereof.

12. On information and belief, plaintiffs aver that for the calendar year ending December 31, 1959, the gross

sales of each of the corporate defendants exceeded the sums set forth below:

(a) INTERNATIONAL	$17,000,000
(b) MIDAS	7,500,000
(c) POWELL	2,000,000
(d) MCA	2,000,000

13. Defendant MIDAS during the periods relevant to this complaint purchased, for resale at wholesale, automotive exhaust parts from the defendants INTERNATIONAL, POWELL, and MCA and from other individuals, firms, and/or corporations unknown which were engaged in business competitively with INTERNATIONAL, POWELL, and MCA. This defendant distributed and sold such automotive exhaust parts exclusively to individuals, firms, and/or corporations, including but not limited to the plaintiffs herein, with whom it had entered into a standard-form exclusive agreement as defined herein. By this means the defendant MIDAS distributed and sold automotive exhaust parts on a nationwide basis under more than 250 separate standard-form exclusive agreements to independent contractees, including but not limited to plaintiffs herein, located throughout the United States.

14. During the periods relevant to this complaint, this defendant's standard-form exclusive agreement prohibited each of the plaintiffs herein, and/or any other contractees thereunder, from purchasing, and/or purchasing and selling, and/or selling, and/or handling, and/or servicing any automotive exhaust parts and/or allied automobile products which had not been purchased and/or acquired from the defendant MIDAS; required contractees thereunder to maintain retail prices published by the defendant MIDAS;

limited the territory within which contractees there-
14 under were authorized to engage in business; required

contractees thereunder to devote all of their time to the operation of the business defined by their respective standard-form exclusive agreements; obligated contractees thereunder personally, upon certain specific guarantees which the defendant MIDAS authorized in connection with the sale and installation of its mufflers; and required contractees thereunder to contribute 2 per cent of purchases from the defendant MIDAS for such "national advertising" as defendant MIDAS might in its discretion authorize.

15. Each of the standard-form exclusive agreements referred to herein authorized contractees thereunder to use the word "MIDAS" in connection with the businesses defined by such standard-form exclusive agreements, but the relationship created by each of such standard-form exclusive agreements was, by their express terms, that of seller and buyer, and not principal and agent.

DESCRIPTION OF PLAINTIFFS

16. Each of the following individuals, firms, and/or corporations are plaintiffs herein. Each of these plaintiffs accepted a standard-form exclusive agreement with the defendant MIDAS, and from and as of the date of acceptance, as set forth below, under that exclusive agreement, and/or subsequent exclusive agreements and/or additional exclusive agreements, and until the date and/or dates of termination of such exclusive agreements, also as set forth below, was engaged in the business of selling and installing automotive exhaust parts within the exclusive sales territory and/or territories defined by its exclusive agreement at the address and/or addresses set forth below and/or at other addresses within said territory and/or territories:

15

Plaintiff and Address	Relevant Period Acceptance	Relevant Period Termination
(A) Perma Life Mufflers, Inc., a Maryland corporation; 2404 Price Avenue, Wheaton, Md.	Apr. 1956	Feb. 12, 1960
(B) Perma Life Mufflers of Arlington, Inc., a Virginia corporation; 2115 Wilson Boulevard, Arlington, Va.	Dec. 1956	Feb. 12, 1960
(C) Perma Life Mufflers of Prince Georges County, Inc., a Maryland corporation; 3606 Bladensburg Rd., Cottage City, Md.	May 1957	Feb. 12, 1960
(D) Perma Life Muffler Shops of Alexandria, Va., Inc., formerly Midas Muffler Shops of Alexandria, Va., Inc., a Virginia corporation; 1912 Duke Street, Alexandria, Va.	Mar. 1958	Feb. 12, 1960
(E) Robin Hood of Grand Rapids, Inc., formerly Midas of Grand Rapids, Inc., a Michigan corporation; 726 Division Street, Grand Rapids, Mich.	Apr. 1956	Dec. 22, 1959
(F) Robin Hood of Muskegon, Inc., formerly Midas of Muskegon, Inc., a Michigan corporation; 2107 Henry Street, Muskegon, Mich.	Jan. 1956	Dec. 22, 1959

	Plaintiff and Address	Relevant Period — Acceptance	Relevant Period — Termination
	(Amendment filed Feb. 8, 1961).[2]		
39 16(G)	Regina M. Ross, Assignee of Maxwell E. Ross, t/a Robin Hood Muffler Shop, formerly t/a Midas Muffler Shop, an individual; 4109 South Westedge Avenue, Kalamazoo, Mich.	Apr. 19, 1958	Dec. 22, 1959
	(Original complaint continued)		
15(H)	Regina M. Ross, Assignee of Maxwell E. Ross, formerly t/a Midas Muffler Clinic of Minneapolis, an individual; formerly 1400 Hennipen Avenue, Minneapolis, Minn., and/or 4109 East Lake Street, Minneapolis, Minn.	Nov. 1956	Sept. 3, 1958
16(I)	Regina M. Ross, Assignee of Maxwell E. Ross, formerly t/a Midas Muffler Shop of Battle Creek, an individual; formerly 1020 East Columbia Avenue, Battle Creek, Mich.	May 1959	Dec. 22, 1959
(J)	Claude Wheeler, t/a Robin Hood Muffler Shops, formerly Midas Muffler Shops, an individual; 1163 South Kingshighway, St. Louis, Mo.; 5335 State Street, East St. Louis, Ill.	Sept. 1956	Nov. 9, 1959

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[2] Original paragraph 16(G) is on page 15 of the Record.

Plaintiff and Address	Relevant Period: Acceptance	Relevant Period: Termination
(K) B. Paul Morris, t/a Morris Muffler Shop, formerly t/a Midas Muffler Shop, an individual; 515 English Street, High Point, N. C.	Apr. 1957	Mar. 31, 1960
(L) B. Paul Morris, t/a Morris Muffler Shop, formerly t/a Midas Muffler Shop, an individual; 224 Commerce Place, Greensboro, N. C.	Sept. 1957	Mar. 31, 1960
(M) Pierce Muffler Shops, Inc., formerly Midas Muffler Sales & Service, Inc., a New York corporation; 1205 Erie Boulevard East, Syracuse, N. Y.; 511 South State Street, Syracuse, N. Y.; 1205 Oriskany Street West, Utica, N. Y.; 48 State Street, Binghamton, N. Y.; 135 Erie Boulevard West, Rome, N. Y.; 261 Baldwin Street, Elmira, N. Y.	Apr. 1956	Nov. 31, 1959 *(sic)*

17. During the periods relevant to this complaint sales of automotive exhaust parts by each of the plaintiffs herein within the exclusive sales territory and/or territories defined by their respective standard-form exclusive agreements constituted a substantial volume of the total sales of automotive exhaust parts within said territory and/or territories.

17 18. Following termination of their respective standard-form exclusive agreements as set forth hereinabove, each of the plaintiffs continued to be engaged and, as of the date hereof, each is presently engaged (excepting plaintiff REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a MIDAS MUFFLER CLINIC OF MINNEAPOLIS and MIDAS MUFFLER SHOP OF BATTLE CREEK) in the business of selling and installing automotive exhaust parts, and each of such plaintiffs has since the date of its termination, as set forth hereinabove, expanded the scope of its business to include the sale and installation of allied automobile products as defined herein. In the course of their respective businesses, since the date of their respective terminations as set forth hereinabove, each of the plaintiffs (except REGINA M. ROSS as set forth above) has purchased and continues to purchase for resale and installation automotive exhaust parts and allied automobile products from numerous sources of supply located both within and without the respective states within which each of such plaintiffs herein does business.

COUNT ONE

19. During the period beginning about January 1, 1955, to and including the date hereof, the defendants and other co-conspirators unknown violated Section 1 of the Sherman Act (15 U.S.C. 1) in that they have combined together, and/or agreed, and/or contracted, and/or planned, and/or conspired to unlawfully restrain and substantially lessen competition in the sale of automotive exhaust parts and allied automobile products as hereinbefore defined in interstate commerce, and in that they combined together, and/or agreed, and/or contracted, and/or planned, and/or conspired unlawfully to fix and maintain prices of automotive exhaust parts and to create and/or induce a commercial

boycott and/or boycotts, the effects of which were to unlawfully restrain and substantially lessen competition in the sale of automotive exhaust parts and allied automobile products as hereinbefore defined in interstate commerce.

18 COUNT TWO

20. During the period beginning about January 1, 1955, up to and including the date hereof, the defendants, including but not limited to the defendant MIDAS, violated Section 3 of the Clayton Act (15 U.S.C. 14) in that they contracted for the sale of, and sold, mufflers and/or other parts of automotive exhaust systems for use, consumption, and resale within the United States and/or the District of Columbia, and/or fixed the prices thereof, upon the condition, agreement, and understanding that purchasers of such mufflers and/or other parts of automotive exhaust systems, including but not limited to the plaintiffs herein, would not use or deal in mufflers and/or other parts of automotive exhaust systems and/or the products and/or merchandise manufactured and/or sold by individuals, firms, and/or corporations other than the defendants herein, and the effect of such contracts of sale, and sale, on such conditions, agreements, and understandings was to substantially lessen competition and/or tend to create a monopoly in the sale and/or sale for resale of mufflers, and/or parts of automotive exhaust systems, and/or allied automobile parts.

COUNT THREE

(Amendment filed Nov. 9, 1961)

153 Paragraph 21 is deleted in its entirety and the following is substituted therefor and in lieu thereof:[3]

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[3] Original paragraph 21 is on page 18 of the Record.

"21. During the period beginning about January 1, 1955, up to and including March 31, 1960, defendants, including but not limited to MIDAS, violated Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13), in that they granted discriminations in prices and services prohibited by Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13) in connection with the sale in interstate commerce of automotive exhaust parts of like grade and quality to certain of their customers without offering, or otherwise making those same or similar services available to plaintiffs herein
154 in connection with their purchase in commerce of the same, or similar, automotive exhaust parts from the defendants including defendant MIDAS.

(Original complaint continued)

19 SPECIFIC EXAMPLES OF ILLEGAL ACTS

22. The defendants and co-conspirators unknown, pursuant to agreement, plan, combination and/or conspiracy and by other divers means, methods, and acts sought to accomplish, and accomplished, the illegal ends described herein; among such divers means, methods and acts were the following:

(A) Beginning on or about January 1, 1955, the defendants INTERNATIONAL, POWELL, and MCA, together and/or each with the other, sought to promote, promoted, planned, sought to establish, and with the defendant MIDAS subsequently established, an illegal boycott and/or boycotts in that (a) they jointly agreed upon and selected those persons, firms and corporations who would be offered, and allowed to accept, exclusive agreements with the defendant MIDAS, and thereafter defendant MIDAS and/or

boycott and/or boycotts, the effects of which were to unlawfully restrain and substantially lessen competition in the sale of automotive exhaust parts and allied automobile products as hereinbefore defined in interstate commerce.

18 COUNT TWO

20. During the period beginning about January 1, 1955, up to and including the date hereof, the defendants, including but not limited to the defendant MIDAS, violated Section 3 of the Clayton Act (15 U.S.C. 14) in that they contracted for the sale of, and sold, mufflers and/or other parts of automotive exhaust systems for use, consumption, and resale within the United States and/or the District of Columbia, and/or fixed the prices thereof, upon the condition, agreement, and understanding that purchasers of such mufflers and/or other parts of automotive exhaust systems, including but not limited to the plaintiffs herein, would not use or deal in mufflers and/or other parts of automotive exhaust systems and/or the products and/or merchandise manufactured and/or sold by individuals, firms, and/or corporations other than the defendants herein, and the effect of such contracts of sale, and sale, on such conditions, agreements, and understandings was to substantially lessen competition and/or tend to create a monopoly in the sale and/or sale for resale of mufflers, and/or parts of automotive exhaust systems, and/or allied automobile parts.

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(Amendment filed Nov. 9, 1961)

153 Paragraph 21 is deleted in its entirety and the following is substituted therefor and in lieu thereof:[3]

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[3] Original paragraph 21 is on page 18 of the Record.

"21. During the period beginning about January 1, 1955, up to and including March 31, 1960, defendants, including but not limited to MIDAS, violated Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13), in that they granted discriminations in prices and services prohibited by Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13) in connection with the sale in interstate commerce of automotive exhaust parts of like grade and quality to certain of their customers without offering, or otherwise making those same or similar services available to plaintiffs herein
154 in connection with their purchase in commerce of the same, or similar, automotive exhaust parts from the defendants including defendant MIDAS.

(Original complaint continued)

19 SPECIFIC EXAMPLES OF ILLEGAL ACTS

22. The defendants and co-conspirators unknown, pursuant to agreement, plan, combination and/or conspiracy and by other divers means, methods, and acts sought to accomplish, and accomplished, the illegal ends described herein; among such divers means, methods and acts were the following:

(A) Beginning on or about January 1, 1955, the defendants INTERNATIONAL, POWELL, and MCA, together and/or each with the other, sought to promote, promoted, planned, sought to establish, and with the defendant MIDAS subsequently established, an illegal boycott and/or boycotts in that (a) they jointly agreed upon and selected those persons, firms and corporations who would be offered, and allowed to accept, exclusive agreements with the defendant MIDAS, and thereafter defendant MIDAS and/or

other of the corporate defendants boycotted those who were not so selected; (b) they jointly agreed upon those persons, firms, and corporations who would be allowed to continue to be engaged in business pursuant to exclusive agreements with the defendant MIDAS, and thereafter defendant MIDAS and/or other of the corporate defendants boycotted those persons, firms, and corporations whose exclusive agreements were terminated; and (c) caused all MIDAS contractees, including the plaintiffs herein, as a condition of the handling of MIDAS products, to agree to boycott all other suppliers of automotive exhaust parts as well as suppliers of allied automobile products.

(B) To achieve their unlawful objectives, INTERNATIONAL, POWELL, and MCA organized, and/or had organized at their direction, an Illinois corporation whose official name was MIDAS, INC., which corporation is named as a defendant herein, and/or acquired, either directly or indirectly through agents and/or nominees, all of the issued and outstanding stock of such corporation to which the defendant INTERNATIONAL transferred and/or otherwise assigned all of its right, title, and interest in and to the name MIDAS.

20 (C) INTERNATIONAL, POWELL, and MCA, one with the other, and each with the defendant MIDAS, INC., agreed, planned, combined and/or conspired to establish a nationwide system of independent contractors dealing exclusively in automotive exhaust parts manufactured, and/or manufactured and sold, and/or sold to them by the defendant MIDAS.

(D) To achieve their unlawful objectives, the defendants, and each of them, agreed, planned, combined, and/or conspired concerning the terms of a standard-form exclusive

agreement under which the defendant MIDAS would authorize independent contractors to operate.

(E) Pursuant to such agreement, plan, combination, and/or conspiracy, the defendants promulgated a standard-form exclusive agreement entitled "License and Sales Agreement," which the defendant MIDAS adopted, authorized, and commenced using in interstate commerce.

(F) The standard-form exclusive agreement adopted by the defendant MIDAS pursuant to its agreement, plan, combination, and/or conspiracy with INTERNATIONAL, POWELL, and MCA, and other of the defendants named herein as well as others unknown, prohibited contractees thereunder from purchasing, and/or purchasing competitively, and/or selling, and/or selling competitively any automotive exhaust parts which had not been manufactured and/or sold to such contractees by the defendant MIDAS; prohibited contractees thereunder from purchasing, and/or purchasing competitively, and/or selling, and/or selling competitively any allied automobile products; required contractees thereunder to maintain prices published by the defendant MIDAS; limited the territory and/or territories within which contractees thereunder were authorized to engage in business; required contractees thereunder to devote all of their time to the operation of the business defined by their respective exclusive agreements; obligated contractees thereunder personally upon certain specific
21 guarantees on mufflers which the defendant MIDAS
authorized; and required contractees thereunder to contribute 2% of purchases from MIDAS for national advertising which the defendant MIDAS might in its discretion authorize.

(G) Pursuant to the agreement, plan, combination, and/or conspiracy aforesaid, defendant MIDAS entered into

numerous contracts with individuals, firms, and corporations located throughout the United States. On information and belief plaintiffs allege during the period beginning January 1, 1956, and ending March 31, 1960, the defendant MIDAS, INC. entered into more than 250 such contracts, herein referred to as exclusive agreements, with more than 75 separate individuals, firms, and/or corporations who were engaged in business in more than 25 different states of the United States. Among the individuals, firms, and corporations with whom the defendant MIDAS contracted were the plaintiffs herein. Except as otherwise alleged herein, all such contracts were in writing and fully executed by the parties thereto. Defendants, up to and including the date hereof, have continued to maintain their nationwide system of retail outlets operating under exclusive agreements.

(H) Certain of the individuals, firms and/or corporations with whom the defendant MIDAS entered into exclusive agreements were, prior to such exclusive agreements, authorized by the defendant INTERNATIONAL to purchase and/or sell automotive exhaust parts and allied automobile products manufactured and/or sold by the defendant INTERNATIONAL. For example, plaintiff PERMA LIFE MUFFLERS, INC. was, prior to April of 1956, an authorized dealer of the defendant INTERNATIONAL.

(I) The defendants, and each of them, agreed, planned, and/or conspired, each with the other, concerning the firms, individuals, and/or corporations with whom the defendant MIDAS would enter into standard-form exclusive agreements.

22 (J) Each of the standard-form exclusive agreements between the plaintiffs and/or any of them and the

defendant MIDAS, which were identical to the standard-form exclusive agreements which the defendants MIDAS entered into with other persons, firms, and/or corporations located throughout the United States, provided in pertinent part as follows: (a) that the relationship between the plaintiffs and each of them and the defendant MIDAS was that of seller and buyer, and not principal and agent; (b) that plaintiffs and each of them were authorized to use the name MIDAS and to sell and install automotive exhaust parts exclusively within but not without the specific territory and/or territories defined by their respective exclusive agreements; (c) that plaintiffs and each of them would not, without the written consent of the defendant MIDAS, sell, install, and/or service any products other than those purchased from the defendant MIDAS; (d) that plaintiffs and each of them would purchase automotive exhaust parts from the defendant MIDAS at the same price and/or prices at which other MIDAS contractees purchased automotive exhaust parts from the defendant MIDAS; (e) that plaintiffs and each of them would maintain the retail sales price published by the defendant MIDAS on all products which they sold; (f) that plaintiffs and each of them would not engage in any business or employment other than that as defined by their exclusive agreements, and would devote all of their time to the operation of the business and/or businesses defined by their respective exclusive agreements; (g) that the defendant MIDAS would replace and/or adjust with plaintiffs and each of them any merchandise within the limits of the specific guarantees which the defendant MIDAS authorized; and (h) that plaintiffs and each of them would pay the defendant MIDAS a surcharge of 2% of the total amounts of their respective purchases, which amounts the defendants MIDAS was authorized to set aside and utilize for national advertising in its discretion.

C.

23 (K) In the course of their business operations and within the terms of their exclusive agreements, plaintiffs, or some of them, repeatedly requested permission and/or consent of the defendant MIDAS to purchase, and/or sell, and/or service automotive exhaust parts and/or allied automobile products from and/or of sources of supply other than the defendant MIDAS, but such requests for permission and/or consent were consistently denied. Had plaintiffs, or any of them, received permission and/or consent as requested, they would have purchased automotive exhaust parts and allied automobile products from numerous sources of supply located throughout the several states of the United States.

(L) On numerous occasions plaintiffs, or some of them, were approached by representatives of firms engaged in the sale of automotive exhaust parts and/or allied automobile products who offered to sell automotive exhaust parts and/or allied automobile products to plaintiffs, or some of them. In many such instances the prices at which such automotive exhaust parts were offered to plaintiffs, or each of them, were generally substantially lower than the prices at which the plaintiffs, and each of them, purchased similar and/or identical automotive exhaust parts from the defendant MIDAS. Plaintiffs, or some of them, refrained from accepting such offers of sale because of the restrictions imposed upon their purchasing, and/or selling, and/or servicing by their exclusive agreements with the defendant MIDAS, and because of the consistent refusal of the defendant MIDAS to grant permission and/or give its consent to plaintiffs and/or any of them to sell, and/or service, and/or purchase automotive exhaust parts and/or allied automobile parts, other than as defined by their respective exclusive agreements.

(M) In the course of their business operations, plaintiffs, or some of them, repeatedly requested permission and/or consent of the defendant MIDAS to expand the area of their business operations beyond those defined by their exclusive agreements and/or to increase the number
24 of retail outlets which they operated within the territory defined by their respective exclusive agreements, but such requests were consistently denied.

(N) In the course of their business operations, plaintiffs were consistently required by the defendant MIDAS to purchase, and/or sell, and/or service the full line of automotive exhaust parts offered to each of them by such defendant. On numerous occasions plaintiffs, or some of them, requested permission to carry a partial line of automotive exhaust parts offered by this defendant, but on the occasion of each such request, each of such plaintiffs was advised by the defendant MIDAS, and/or its officers, and/or agents, that it would have to purchase, and/or sell, and/or service its full line of automotive exhaust parts.

(O) To enforce the terms of its exclusive agreement with plaintiffs, and each of them, and to accomplish the unlawful ends of the agreement, plan, combination, and/or conspiracy of the defendants as alleged herein, the defendant MIDAS threatened to terminate the exclusive agreement and/or agreements of any of its contractees, including plaintiffs herein, in the event they purchased, and/or sold, and/or serviced automotive exhaust parts from and/or of sources of supply other than the defendant MIDAS, and/or in the event they purchased, and/or sold, and/or serviced allied automobile products. For example, certain of the plaintiffs herein purchased automotive exhaust parts from sources of supply other than defendant MIDAS during periods when such parts were not reasonably available from the defendant MIDAS (and when such parts were reasonably necessary to the continued succesful operation of such plain-

tiffs' businesses). These plaintiffs were advised by defendant MIDAS that unless they desisted from such practices their exclusive agreement and/or agreements with the defendant MIDAS would be terminated. In another instance, the defendant MIDAS in fact terminated the exclusive agreement and/or agreements of one of its contractees and/or one of the plaintiffs herein where such con-
25 tractee and/or plaintiff had purchased and/or sold automotive exhaust parts and allied automobile products from and/or of sources of supply other than the defendant MIDAS. In still another instance, the defendant MIDAS required one of the plaintiffs herein to terminate its established business of selling and installing an allied automobile product, thus requiring this plaintiff to conform to its standard-form exclusive agreement that it would not deal in products other than those purchased from the defendant MIDAS.

23. Beginning in or about January, 1955, the defendants INTERNATIONAL, POWELL, and MCA together, and each with the other, sought to establish, and with the defendant MIDAS subsequently established, through the device of the standard-form exclusive agreement, an unlawful conspiracy, agreement, plan, and/or combination, to fix and/or maintain the prices of automotive exhaust parts.

(Amendment filed Jan. 17, 1961)

230 Paragraphs 24 through 28 inclusive are hereby deleted and the following are substituted therefor and in lieu thereof:[4]

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[4] Original paragraphs 24-28 are on pages 25-27 of the Record and the *first* amendment to these paragraphs is on pages 154-156 of the Record. Paragraphs 24 and 26, as set forth on pages 49-50 of Appellants' Appendix, were stricken on December 18, 1961 (R 226-28), and the following *second* amendment to these paragraphs was filed on Jan. 17, 1961.

"24. The defendant MIDAS sold automotive exhaust parts in interstate commerce to some of its contractees, who competed with plaintiffs herein, giving discounts upon the purchase price therefor, which discounts were not offered, or otherwise made available, to plaintiffs herein in connection with their purchase of the same, or similar automotive exhaust parts and/or automotive exhaust parts of like grade and quality, and the defendant thereby discriminated between some of
231 its contractees and the plaintiffs herein in the prices at which it offered and sold automotive exhaust parts.

"24A. The defendant MIDAS sold automotive exhaust parts in interstate commerce to some of its contractees, giving discounts upon the purchase price therefor, which discounts were not offered or otherwise made available to plaintiffs herein, in connection with their purchase of the same or similar automotive exhaust parts and/or automotive exhaust parts of like grade and quality, and this defendant thereby discriminated between certain of its contractees and the plaintiffs herein in the prices at which it offered and sold automotive exhaust parts.

"25. The defendant MIDAS sold automotive exhaust parts in interstate commerce to some of its contractees, some of whom competed with plaintiffs herein, giving services thereon and/or therewith and/or 'guarantee credit' thereon or therewith under certain enumerated circumstances, which services and/or credit it did not offer and/or otherwise make available to the plaintiffs herein, in connection with their purchase of the same or similar automotive exhaust parts and/or automotive exhaust parts of like grade and quality, and the defendant MIDAS thereby indirectly discrim-

inated between certain of its contractees and the plaintiffs herein in the prices at which it offered and sold automotive exhaust parts. For example, the defendant MIDAS granted 100% credit to certain of its contractees on returned automotive mufflers under its guarantee program, while denying 100% credit on returned automotive mufflers under its guarantee to plaintiffs herein.

"26. The defendant INTERNATIONAL and the corporate co-defendants, including but not limited to the defendant MIDAS, sold automotive exhaust parts in interstate commerce to some of their customers, some of whom competed with plaintiffs herein, giving discounts upon the purchase price therefor, and/or giving services and/or 'guarantee credit' in connection with the sale of automotive exhaust parts, which discounts and/or services and/or guarantee credit were not offered and/or otherwise made available to plaintiffs herein, in connection with their purchase of automotive exhaust parts of like grade and quality, and defendants, and each of them, thereby discriminated, directly and/or indirectly, between certain of their customers and the plaintiffs herein in the prices at which they offered and sold automotive exhaust parts.

232 "27. Through the device of the exclusive agreement, the defendant INTERNATIONAL and other of the corporate defendants, pursuant to their agreement, contract, plan, and/or conspiracy, sold automotive exhaust parts in interstate commerce to plaintiffs through defendant MIDAS, and at the same time sold the same and/or similar automotive exhaust parts, and/or automotive exhaust parts of like grade and quality, to others who were not bound to maintain prices under

an exclusive agreement as were plaintiffs herein; the defendant INTERNATIONAL allowed, and/or permitted, and/or authorized some of such customers other than the contractees and/or the plaintiffs herein to sell automotive exhaust parts at prices which were generally substantially lower than the prices at which plaintiffs herein were authorized to sell such products, and such customers sold automotive exhaust parts at prices which were generally substantially lower than the prices at which plaintiffs herein sold such products; and competition between these plaintiffs, and each of them, and other customers of the corporate defendants was thereby unlawfully restrained.

"28. Through the device of the exclusive agreement, the defendant INTERNATIONAL and its corporate co-defendants, pursuant to their agreement, plan, combination, and/or conspiracy, sold automotive exhaust parts in interstate commerce to the plaintiffs, and each of them, through the defendant MIDAS, at prices which were substantially higher than the prices at which the defendant INTERNATIONAL and other of the corporate co-defendants sold the same and/or similar automotive exhaust parts, and/or automotive exhaust parts of like grade and quality, to other persons, firms, and corporations engaged in competition with the plaintiffs herein; and competition between plaintiffs and other customers of the corporate co-defendants was thereby unlawfully restrained."

(Original complaint continued)

27 29. Through the device of the exclusive agreement, the defendant INTERNATIONAL and other of the corporate co-defendants, pursuant to their agreement, plan, combination, and/or conspiracy, sold allied automobile

products to certain of their customers but refused to sell the same allied automobile products to contractees, including but not limited to plaintiffs herein; and competition in the sale of allied automobile products in interstate commerce was thereby unlawfully restrained.

30. Through the device of the exclusive agreement, the defendant INTERNATIONAL and other of the corporate co-defendants, pursuant to their agreement, plan, combination, and/or conspiracy, sold automotive exhaust parts to the plaintiffs for resale within the United States and/or fixed prices thereof on the written condition that the plaintiffs would not use or deal in automotive exhaust parts and/or allied automobile products manufactured and/or sold by persons, firms, and/or corporations other than defendant MIDAS.

(Amendment filed Nov. 9, 1961)

156 Paragraph 31 is deleted in its entirety and the following is substituted therefor and in lieu thereof:[5]

"31. The defendant MIDAS surcharged each of the plaintiffs herein with a 2% advertising payment for which it failed and/or refused to give equivalent value to
157 each of the plaintiffs herein and/or utilize the proceeds of such surcharge for advertising beneficial to some contractees, but not beneficial to plaintiffs herein, and this defendant thereby indirectly discriminated in the price at which it sold automotive exhaust parts of like grade and quality in commerce."

EFFECTS OF ILLEGAL ACTS

28 32. The effect of the defendants' illegal acts, including but not limited to the conduct aforesaid and other

[5] Original paragraph 31 is on page 27 of the Record.

acts in furtherance of the conspiracy, was to unreasonably restrain and substantially lessen competition in the purchasing, and/or purchasing competitively, and/or selling, and/or selling competitively of automotive exhaust parts and allied automobile products in competition in interstate commerce.

33. In the absence of the restrictions imposed by the standard-form exclusive agreement aforesaid: (a) plaintiffs, and each of them, would have been able to purchase automotive exhaust parts and allied automobile products from many sources of supply located throughout the several states of the United States; (b) plaintiffs, and each of them, would have been able to purchase automotive exhaust parts at prices substantially lower than the prices at which such parts were in fact purchased by the plaintiffs, and each of them, from the defendant MIDAS; (c) plaintiffs, and each of them, would have been able to offer automotive exhaust parts to the consuming public at prices substantially lower than those at which they in fact did sell such parts to the consuming public; (d) plaintiffs, and each of them, would have been able to sell and install allied automobile products and parts thereof; and (e) plaintiffs, and each of them, would have been able to expand their business operations, both within and without the territory and/or territories defined by their respective exclusive agreements.

34. In the absence of the restrictions imposed upon them by their respective exclusive agreements, plaintiffs, and each of them, would have purchased automotive exhaust parts and allied automobile products from sources of supply other than the defendant MIDAS and would have expanded their business operations, both within and without the territories defined by their respective exclusive agreements.

29 35. In the absence of the restrictions imposed upon them by their respective exclusive agreements, plain-

tiffs, and each of them, would have purchased identical, and/or similar, and/or equal automotive exhaust parts at prices substantially lower than the prices at which they purchased such parts from the defendant MIDAS.

36. The effects of the defendants' illegal acts, including but not limited to the conduct aforesaid, and other acts in furtherance of the conspiracy, were: (a) to prevent plaintiffs herein and other contractees from dealing with persons, firms, and corporations engaged in business competitively with the defendants and to require the plaintiffs herein and other contractees to purchase automotive exhaust parts manufactured and/or sold by persons, firms, and corporations engaged competively with the defendants, through the defendants rather than from such persons, firms, and corporations directly; (b) to prevent plaintiffs herein and other contractees from purchasing and/or selling and/or servicing allied automobile products; (c) to prevent plaintiffs herein and other contractees from pricing and selling automotive exhaust parts and allied automobile products competitively with other persons engaged in the business of selling and installing automotive exhaust parts and allied automobile products; and (d) to prevent plaintiffs and other contractees from expanding their business operations both within and without the territory and/or territories defined by their respective exclusive agreements.

37. The actual and potential competition of firms engaged in the business of selling automotive exhaust parts and/or allied automobile products in competition with the defendants, and each of them, was unreasonably restrained and substantially lessened.

38. The actual and potential competition between the plaintiffs, and each of them, and others engaged in the business of selling and installing automotive exhaust parts and/or allied automobile products in competition with

plaintiffs, and each of them, was unreasonably restrained and substantially lessened.

30 39. Prices for the sale of automotive exhaust parts were unlawfully maintained, thus restraining competition in interstate commerce.

PUBLIC INJURY

40. Both the public at large and the consuming public in the marketing territories wherein the plaintiffs, and each of them, were engaged in business were adversely affected by each and every illegal act of the defendants as set forth hereinbefore; and such acts unreasonably restrained and substantially lessened competition and the free flow of interstate commerce.

DAMAGE AND IRREPARABLE INJURY TO PLAINTIFFS AND EACH OF THEM

(Amendment filed Nov. 9, 1961)[6]

157 Paragraph 41 is deleted in its entirety, and the following is substituted therefor and in lieu thereof:

"41. As a result of the aforesaid illegal acts and conduct of the defendants, the plaintiffs suffered loss and damages in the amounts set forth below:

(A) PERMA LIFE MUFFLERS, INC: $358,600

(B) PERMA LIFE MUFFLERS OF ARLINGTON, INC: 143,000

(C) PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC: 69,300

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[6] Original paragraph 41 is on page 30 of the Record.

(D) PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC:	40,700
(E) ROBIN HOOD OF GRAND RAPIDS, INC:	174,900
(F) ROBIN HOOD OF MUSKEGON, INC:	200,200
(G) REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a ROBIN HOOD MUFFLER SHOP, formerly t/a MIDAS MUFFLER SHOP OF KALAMAZOO	53,900
(H) REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a MIDAS MUFFLER CLINIC OF MINNEAPOLIS	50,600
(I) REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a MIDAS MUFFLER SHOP OF BATTLE CREEK:	8,800
(J) CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOP:	294,800
(K) B. PAUL MORRIS, t/a MORRIS MUFFLER SHOP OF HIGH POINT, NORTH CAROLINA	56,100
158 (L) B. PAUL MORRIS, t/a MORRIS MUFFLER SHOP OF GREENSBORO, NORTH CAROLINA:	52,800
(M) PIERCE MUFFLER SHOPS, INC.	502,700"

(Original complaint continued)

31

PRAYERS FOR RELIEF

42. WHEREFORE, plaintiffs pray as follows:

(A) That summonses be issued and directed to each of the defendants hereinabove named, commanding them to appear and to answer the allegations contained in this complaint, and to abide by and perform such orders and decrees as the Court may enter in this cause.

(B) That an order be entered, pursuant to Rule 21 of the Civil Rules of this Court, directing that a separate trial be had upon the issue of the substantive liability of the defendants for the acts hereinabove complained of and the issue of the loss and damage to the plaintiffs as a result of the acts complained of, in the event that the substantive liability of the defendants to the plaintiffs is established.

(C) That: (1) the contracts, combinations, agreements, and conspiracies of the defendants, and other co-conspirators unknown, each with the other; and (2) the restraints of interstate trade and commerce; and (3) the exclusive agreements of the defendant MIDAS, Inc.; and (4) the attempts to fix and the fixing of the price of automotive exhaust parts in the marketing territories of plaintiffs and each of them; and (5) the granting of rebates and/or discriminatorily lower prices by defendants, all be declared to have been illegal and violative of the Sherman and Clayton Acts aforesaid.

(D) That the defendants be ordered to pay the plaintiffs treble the amount of loss and damages sustained by the plaintiffs, and each of them.

(E) That this Honorable Court allow to the plaintiffs, and each of them, and that the defendants pay the full cost

of this suit and include as part thereof a reasonable attorneys' fee for the services of plaintiffs' attorneys.

32 (F) That plaintiffs be granted such other and further relief as this Honorable Court shall deem just and proper.

33 EXHIBIT "A"

Registered No. . . . .

MIDAS, INC.

1023 South State Street, Chicago 5, Illinois

LICENSE AND SALES AGREEMENT

AGREEMENT dated . . . . between MIDAS, INC., an Illinois corporation, (hereinafter called "Seller") and . . . . (hereinafter called "Buyer");

WITNESSETH: Whereas, Seller is the owner of a trade name dominated by the word "MIDAS~~"; and~~

Whereas, Seller is the owner of the trademark "MIDAS" for use in connection with mufflers for internal combustion engines and parts thereof, namely, tail pipes, exhaust pipes and muffler clamps, registered in the United States Patent Office as Registration Nos. 620322 and 641711; and

WHEREAS, Seller is also the owner of the service marks and service registrations containing said name "MIDAS"; and

WHEREAS, Seller is engaged in the business of selling at wholesale, mufflers, tail pipes and exhaust pipes and

accessories bearing said trademark "MIDAS", and through advertising, merchandising and selling such products has built up valuable good will on the part of the purchasing public with respect to said products sold by Seller; and

WHEREAS, Buyer desires to obtain the exclusive right to sell such merchandise in the place of business established or to be established by the Buyer at the address shown herein, and of purchasing such merchandise from Seller upon the same terms and conditions as other buyers under contracts in the same form as this contract, for resale at Buyer's store;

NOW, THEREFORE, in consideration of the premises, and of the mutual covenants, agreements, terms and conditions hereinafter set forth, the parties hereby agree as follows:

I. LICENSE

(a) Subject to all of the covenants, terms and conditions hereinafter provided, Seller hereby grants to Buyer, for and during the terms of this agreement, unless sooner terminated, as herein provided, the exclusive right to handle and sell Seller's products as above described, provided said products are purchased by the Buyer from the Seller, at the following location: ....

....

....

within the following territory: ....

....

....

(Additional locations will be permitted within this territory only with written consent of Seller).

34 (b) Buyer hereby acknowledges the validity of said trademark, trade name and service marks, and covenants and agrees that he will not in any way do anything to infringe upon the rights of Seller in said trademark, trade name and/or service mark, nor will he use said trademark, trade name or service mark, or any name similar thereto, except in the manner permitted by this contract. Buyer further covenants that he will not use said name and/or marks on any products other than products purchased from Seller containing said trademark, nor will Buyer, without the written consent of Seller, assign his rights under this agreement or the right to use said name or marks or any name and/or marks similar thereto.

(c) In the event of the termination of this agreement, all rights of the Buyer to the use of said name or names and/or marks shall cease, and said rights and all good will appertaining thereto shall revert to Seller. Buyer further covenants that in the event that Buyer shall cause his business to be incorporated, the charter of such corporation shall provide that in the event of a termination of this agreement, said corporation will discontinue the use of the name "Midas" or any variation thereof.

(d) Buyer covenants that all literature, circulars, advertising matter of labels which the Buyer may use in connection with the sale of said products, shall contain said trademark and/or service mark, together with the statutory notice of registration, which must be in one of the following forms: "Registered in U. S. Patent Office" or "Reg. U. S. Pat. Off." or the letter R enclosed within a circle, thus "R". Seller shall have the right to require that all such literature and any and all publicity be first submitted to it for written approval before the same is circulated, published or displayed.

(e) It is understood that Seller reserves the exclusive right to grant similar licenses to other Buyers outside the territory for which Buyer is herein given such exclusive license.

(f) Buyer agrees to fill out and furnish promptly any and all reports required by Seller and to make available to Seller or its representative Buyer's latest financial and operating statements immediately upon request of Seller or its representative.

(g) Buyer agrees to capitalize at $.................. in cash.

II. OPERATION OF STORE

(a) Seller grants to Buyer the right, subject to all the other covenants, terms and conditions stated in this agreement, to designate and refer to and operate his store under the name "Midas Muffler Shop, ..., Sole Proprietor," and Buyer shall have no right to use said name, except during the continuance of this agreement, and such right shall cease immediately upon termination thereof for any reason whatsoever, and in such event, Buyer covenants that he will forthwith discontinue the use of said name, or any name similar thereto, and remove from his store stationery and literature, all signs and designations bearing such name.

(b) Buyer covenants and agrees that at all times during the continuance of this agreement he will designate, refer to and operate his store only under the name "Midas Muffler Shop" with the addition of his name as proprietor, without any variation thereof unless with special consent of Seller. However, Buyer agrees that he will not

use said name or any other combination of words, or do any act, or make any statement in such manner which might imply that Buyer's store is an agency or branch of Seller, or that Seller in any manner owns, controls or operates Buyer's business, or is in any manner responsible for Buyer's obligations, or liable for his acts, or that any relationship exists between Seller and Buyer other than that of vendor and purchaser, or that any any affiliation or connection exists between the business conducted by Buyer and businesses conducted by other Buyers, who also purchase merchandise from the Seller. Notwithstanding this paragraph (b), Seller shall at all times have control of the nature and quality of the goods sold and of the nature and quality of the services rendered by Buyer pursuant to this agreement.

(c) Buyer covenants and agrees that he will not, during the continuance of this agreement, without Seller's written consent, handle in said store any products other than those purchased from the Seller, or render services except on such products. Buyer further covenants and agrees that he will devote all of his time to the operation of the shop covered by this franchise and that he will not engage in any other business or employment.

(d) Buyer covenants and agrees that he will prominently display the name "Midas Muffler Shop" on signs, circulars and other advertising, that in all such advertising matter, no other name shall be used (except Buyer may add his name as proprietor). Buyer further covenants and agrees that he will, at his own expense, locally advertise said products under said name to a reasonable degree, and Seller agrees to provide Buyer with mats, suggestions and advice with respect to such advertising. Buyer covenants and agrees to pay to Seller a surcharge of two per cent (2%) of the total amount shown on each invoice of the Seller, which amount Seller agrees to set

aside for national retail advertising purposes, and Seller agrees to spend such moneys for such purposes. Buyer must use only the advetising matter supplied and/or approved by Seller.

35 (e) Seller shall have the right to require Buyer to purchase and pay for such advertising programs as Seller shall apporve for the particular locality of Buyer, when in the opinion of Seller such advertising is necessary for Buyer's successful operation of his franchise; and to join with other franchisees and to pay the pro rata cost of such advertising together with the other franchisees.

(f) Buyer must purchase from Seller for each outlet Seller's standard neon sign upon the opening of each outlet. All such signs must be conspicuously displayed in front of Buyer's premises at all times and properly maintained at all times. In the event of any termination of this agreement, Buyer shall not thereafter use said sign without Seller's consent, and Seller shall have the option, but shall not be required, to repurchase said sign, at cost less depreciation and expense of removal.

(g) Buyer covenants and agrees to procure and maintain, throughout the term of this contract, at his own cost and expense, insurance as described in rider hereto attached.

(h) Upon the execution of this agreement, Buyer agrees to purchase an opening stock for said store amounting to not less than $.......................at cost to the Buyer, for which Buyer shall pay one-half in cash, the balance to be paid net tenth prox.

(i) Buyer covenants and agrees that he will at all times maintain an adequate stock of Seller's products so as to fill all orders, and Seller agrees that so long as Buyer is not in default in any of the covenants, terms or

conditions of this agreement, it will use its best efforts to furnish all such requirements to the Buyer, but Seller shall not be liable for any loss or damage occasioned by Seller's failure to deliver such merchandise.

(j) Terms of payment of all purchases subsequent to opening purchase shall be net tenth prox.

(k) Seller shall have the right at all times to visit the place of business of Buyer, and the right of ingress and egress thereto, for the purpose of inspecting all inventories, the nature and quality of goods sold and services rendered, and the manner and method of operating said store under the terms of this contract; in the event any of Buyer's inventory or business is located outside of said store premises Seller shall have the similar right to inspect the same in said outside premises.

(l) Buyer reserves to himself ownership, management and control of said store.

III. PURCHASES AND SALES

(a) The prices to be charged by Seller and to be paid by Buyer shall be the prices published in price lists by Seller from time to time and identical with prices charged to all other Midas Muffler Shops.

(b) Buyer covenants and agrees that in selling said merchandise he will maintain the retail list selling price set by the respective automobile manufacturers for mufflers and exhaust parts, which list price will be published by Seller.

IV. GUARANTEES

(a) Subject to all other provisions of this contract, Seller agrees, during the continuance of this agreement, to replace and/or adjust to the Buyer any merchandise

purchased from the Seller by the Buyer within the limits of such specific guarantees as Seller furnishes, provided that such merchandise is returned to the Seller, with transportation charges prepaid, within sixty days from the date of Buyer's adjustment with his customer. Upon the termination of this contract for any reason whatsoever, Buyer shall not (except on his own responsibility, and without the right to return the same or obtain any adjustment therefor from Seller) make any further adjustments with any of Buyer's customers.

(b) Buyer covenants and agrees that in order to carry out said guarantee

(1) all written guarantees furnished shall be fully filled in by the Buyer at the time of the sale of said muffler or other part, and shall show the date of such sale, the name of the dealer, and the stock number of the muffler or other part sold.

(2) All customers relying thereon shall be required by Buyer to return to Buyer the muffler or part complained about, together with the original written guarantee furnished to the customer;

(3) Seller reserves the right to inspect and determine nature and cause of complaint so as to determine whether muffler in question is subject to return under said guarantee;

36 (4) Buyer shall not have the right to return any defective mufflers without first obtaining written permission from Seller, wherein Seller will direct disposition of the entire muffler or representative portion thereof, and Seller shall require that all mufflers returned as defective be accompanied by the guaranty ship provided with the original sale of the muffler, properly filled out.

V. TERMINATION AND GENERAL PROVISIONS

(a) This agreement may be terminated at any time by either party upon giving the other thirty days written notice of such intention prior to said termination date. The giving of such notice by either party shall relieve the Seller of selling or shipping any merchandise after the giving of such notice. Notice of termination herein provided for shall be sent to the respective parties at the address of their place of business as herein stated. The termination of this agreement shall not relieve either Seller or Buyer from the obligation to perform any covenant which this agreement requires to be performed after the termination thereof, and shall not relieve Buyer of his obligation to pay to Seller any unpaid portion of the purchase price of merchandise purchased from Seller during the term of this agreement, and any other amounts owing to Seller at such date. In the event of termination, all inventories on hand shall be disposed of as Seller shall direct. Buyer further agrees that if this agreement is cancelled by Seller because of any breach of the provisions hereof on the part of the Buyer, or if said agreement is otherwise cancelled under the terms hereof, the Seller shall have the option to purchase all of the trademarked Midas articles at Buyer's cost, less freight charges which are to be paid by Buyer, and less 10% for handling. Buyer further agrees that in the event of any termination of this agreement, he will (1) have all listings in the name of Midas or any similar name eliminated from telephone directories, and, if Buyer fails to do so expeditiously, Seller shall have the right and is hereby authorized by the Buyer to have such listings eliminated; (2) remove any and all signs containing the word "Midas" appearing in or about Buyer's premises.

(b) This agreement contains all of the agreements of the parties, expressed or implied, and no representations

made by any representative of Seller shall be binding unless expressly contained herein. A waiver by Seller of any violation of any provisions of this agreement shall not constitute a waiver of any further violation or any other provisions of this agreement. The license and sales agreement is not transferable without the written consent of Seller.

(c) The agreement shall not became effective until signed by both parties. Seller shall not be bound hereby unless this agreement is signed in its behalf by its president or one of its vice presidents, or by its secretary.

(d) This agreement shall be binding on and inure to the benefit of the parties hereto and their respective successors, legal representatives, heirs and assign.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in triplicate as of the day first above written.

MIDAS, INC. (Seller)

By ....
(President, Vice President or Secretary)

..............................(SEAL)

..............................(SEAL)
(Buyer)

....
Buyer's address

Witness to Buyer's Signature

....

....

Appendix A to Answer of Defendants Provisions of Defendants' Dealer Agreements.

*   *   *   *   *

65 (c) Buyer covenants and agrees that he will not, without Seller's written consent, handle in said store any products other than those purchased from the Seller, and/or render services in connection with the sale, installation and servicing of mufflers and related products which do not meet Seller's standard of high quality.

*   *   *   *   *

71 (c) Buyer covenants and agrees that he will not, during the continuance of this agreement, without Seller's written consent, handle in said store any products other than those purchased from the Seller, or render services in connection with the sale, installation and servicing of such products, since other products may not meet Seller's standard of high quality.

*   *   *   *   *

73 (b) Buyer covenants and agrees that in selling said merchandise he will maintain the retail list selling price set by the respective automobile manufacturers for mufflers and exhaust parts, which list price will be published by Seller.

*   *   *   *   *

74 (a) This agreement may be terminated at any time by either party upon giving the other thirty days written notice of such intention prior to said termination date.

*   *   *   *   *

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 60 C 1636) * *

Answers to Interrogatory served on Corporate Defendants, International, Midas, Powell and Muffler Corporation of America.

* * * * * *

302 "12. If you do not know the answer to Interrogatory No. 11, set forth the design and construction specifications for each different type of muffler which you sold during the period bearing the trademarks "Midas" or "International;" or, if your answer to the preceding interrogatory is wholly or partially negative, set forth with particularity and specificity the design or construction features distinguishing each different application or mufflers bearing the trademark "International" from those bearing the trademark "Midas" together with the periods during which each of these distinctive features existed."

Midas and International-brand mufflers have always carried different trade names, affixed to the mufflers themselves, and have been sold to different classes of customers.

Since on or about January 1, 1959 Midas mufflers have generally been produced with 16 gauge baffles and 20 gauge tubes whereas International-brand mufflers have been produced with 18 gauge baffles and 24 gauge tubes. Also the outer shells of the Midas and International mufflers have been of different design and color-tone, giving each of the two mufflers a distinct and different appearance.

DEFENDANTS' ANSWERS TO INTERROGATORIES

Answer to Interrogatory 38

306 The total amount spent by International in national advertising of the Midas name in the period January 1, 1956 to December 31, 1960 was $3,570,424.55.

This advertising has included advertisements in such magazines having national circulation as Life, The Saturday Evening Post, Readers Digest, T.V. Guide, Parade, Sports Illustrated, and This Week; sponsorship of, and spot advertisements in conjunction with, such national network radio programs as NBC News on the Hour, Monitor, Paul Harvey, and Gunsmoke; sponsorship of such national network television programs as Today, All Star Baseball Pre-Game Show, The Kentucky Derby Preview, PGA Golf Tournament, Jack Paar, Lawless Years, Suspicion, Five Fingers, Laramie, Plainsman, People Are Funny, and The National Open Golf Tournament; and display and other point of sale advertising supplied without charge to International customers handling Midas-brand products.

The following table shows the local stations that carried national programs advertising the Midas name in each of the cities in which plaintiffs' shops were located.

307

	NBC		CBS		ABC
	Radio	*TV*	*Radio*	*TV*	*Radio*
Washington	WRC	WRC	WTOP	WTOP	WMAL
Syracuse	WSYR	WSYR	WHEN	WHEN	WFBH
Binghamton	WINR	WINR	WNBF	WNBF	WENE
Elmira	WENY	WTVE WSYE	WLEM	WNBG	WLEM
Utica	WSYR	WKTV	WIBX	WTEN	WTLB
Rome	WSYR	WKTV	WIBX	WTEN	WTLB

	NBC Radio	NBC TV	CBS Radio	CBS TV	ABC Radio
St. Louis—East St. Louis	KSD	KSD	KMOX	KMOX	KNOX WIL WBBR
Grand Rapids	WOOD	WOOD	WVEF	WKZO	WLAU
Muskegon	WOOD	WOOD	WBBM	WKZO	WKBZ
Battle Creek	WJIM	WJIM	WKZO	WKZO WJIM	WELL
Kalamazoo	WJIM	WOOD	WKZO	WKZO	WXYZ
Minneapolis	KSTP	KSTP	WCCO	WCCO	WTCN

PLAINTIFF SKARUPA'S ANSWERS TO INTERROGATORIES

Answer To Interrogatory II

452 c. Plaintiffs were not permitted to satisfy the demand for additional muffler shops in the Washington Metropolitan Area. Had they been permitted to, plaintiffs would have opened three additional shops which would have had additional sales of approximately $100,000.00 per year each, or a total additional sales of approximately $300,000.00 per year. Net profit would have averaged 20% per year.

Damages: $60,000.00 per year.

• • •

Answer To Interrogatory IV

(Excerpts from Skarupa's Newspaper Advertisements)

• • •

461 Mufflers, Tailpipes, Dual Exhausts for Every Car and Truck.

• • •

Member America's Only Coast-to-Coast Network of Exclusive Auto Muffler Shops.

• • •

462 . . . we're specialists in just one thing—your car's exhaust system. . . .

• • •

463 ANNOUNCING! The Newest Member of The Great National Network of Midas Muffler Shops.

• • •

Look for the MIDAS Sign—America's only coast-to-coast network of exclusive auto muffler shops.

• • •

(Excerpts from Skarupa's Radio and TV Advertisements)

• • •

474 . . . visit any one of Washington's three MIDAS MUFFLER SHOPS. Famous MIDAS mufflers come to you . . . installed FREE within fifteen minutes, while you watch . . . with a written guarantee from the factory for the lifetime of your car. It's a guarantee that follows you around the United States, to more than 200 cities bearing the MIDAS MUFFLER SHOPS sign. . . .

• • •

476 . . . Your MIDAS muffler carries a written factory guarantee good from coast-to-coast. And always depend on MIDAS MUFFLER tailpipes & dual exhaust systems for complete safety. They're available at the SHOPS

devoted exclusively to your car's exhaust system needs . . . your MIDAS MUFFLER SHOPS. . . .

* * *

481 . . . MIDAS dual exhaust specialists will convert your present single exhaust system to a dual, in practically no time at all. You see, MIDAS exhaust experts perform in minutes the work ordinary garages and dealers take hours to do. . . .

* * *

485 . . . Your MIDAS muffler carries a written factory guarantee good from coast-to-coast. And always depend on MIDAS muffler tailpipes & dual exhaust systems for complete safety. They're available at the Shop that's devoted exclusively to your car's exhaust system needs . . . the MIDAS MUFFLER SHOPS at. . . .

* * *

PLAINTIFF PIERCE'S ANSWERS TO INTERROGATORIES

Answer To Interrogatory IV

(Excerpts from Pierce's Newspaper Advertisment)

* * *

663 Member America's Only Coast-to-Coast Network of Exclusive Auto Muffler Shops.

* * *

664 MIDAS Muffller Shops

SPRINGS
Installation Free
in 30 Minutes

* * *

(Excerpts from Pierce's Radio and TV Advertisements)

* * *

680 . . . When your car needs a new tail pipe or dual exhaust system there is only one place to take it—and that is to your nearby MIDAS Muffler Shop at . . . .

* * *

681 . . . Oddly enough though, despite all of the radical changes in automobiles, it was only recently that a really revolutionary method of servicing your car's exhaust system was developed. That, of course, is the MIDAS Muffller Shop method. . . .

* * *

685 . . . You can have confidence, your MIDAS man is a specialist trained to give your car dependable service! No matter what make or model car or truck—you can depend on MIDAS for the world's finest mufflers, tailpipes and exhaust systems. . . .

* * *

PLAINTIFF WHEELER'S ANSWERS TO INTERROGATORIES

Answer To Interrogatory IV

(Excerpts from Wheeler's TV Advertisements)

* * *

813 . . . Come in to the Midas Muffler Shop at . . . for your FREE exhaust system checkup. Then save money on a new Midas Muffler and Tailpipe.

* * *

817 . . . Let your dependable MIDAS exhaust system specialists give your car a FREE exhaust system safety check. . . .

* * *

818 Does your car need a new muffller? . . . tailpipe? . . . exhaust system service? Wherever you are throughout the U.S.A. you can depend on fast, reliable service at your nearby MIDAS MUFFLER SHOP (address). You get only nationally-advertised MIDAS products backed by a factory-written guarantee good for the life of your car!

* * *

(Excerpts from Wheeler's Newspaper Advertisements)

* * *

822 . . . Save Time at Your Exclusive Auto Exhaust System Center. . . .

* * *

823 . . . Original Muffler Specialists . . .

* * *

Answer of Plaintiff Gregory T. Skarupa, et. al. to Interrogatory No. VIII addressed to all Plaintiffs:

* * * * *

509 a. In September, 1955, Mr. Zuckerman was instructed by Gordon Sherman to call at my home to explain methods of operation of an International Parts Muffler Shop and to assist me in finding a location in which to do business. Mr. Zuckerman explained in detail how to order mufflers and tailpipes, provided me with International Parts catalogs and International Price Lists including the "white" sheet showing prices at which re-

tail sales would be made; the "yellow" sheet at which sales to the automotive trade would be made; and the
510 "blue" sheet showing the prices we would pay International Parts, for mufflers, tailpipes, dual kits, clamps, exhaust pipes, hangers, bushings, etc. During these communications Mr. Zuckerman was careful to explain that we were becoming a part of a chain operation that would charge the customer the same price coast-to-coast and that our stocks should be bought exclusively from International Parts because of the guarantee that we would issue to the customer with each muffler purchased. These guarantees, issued with International Mufflers, would be honored coast-to-coast by other International Parts Muffler Shops.

Beginning with the signing of our Midas franchise for the Wheaton Shop in April 1956, and continuing throughout his tenure as a Midas Field Counsellor, Mr. Zuckerman constantly reiterated Midas policy against buying any automotive exhaust parts and/or allied automobile products from sources of supply other than Midas. Usually, these statements were made in the Wheaton shop to me personally, or in telephone conversations when Mr. Zuckerman called me concerning the amount of sales or general conditions of business. During these calls,
511 I would tell Mr. Zuckerman of various offers I had received from various tail-pipe manufacturers, clamp and hanger manufacturers, and from firms like the Goerlich Muffler Company to sell me automotive exhaust parts and allied automobile products at lower prices, and asked Mr. Zuckerman why I couldn't buy at the lower prices offered. Mr. Zuckerman's replies were always to the effect that Midas dealers were expected to buy all their stock exclusively from Midas and that dealers who bought their merchandise from outside sources were "asking for trouble." He often recited the situations at the Syracuse,

Buffalo, Philadelphia and certain Massachusetts dealerships which he had orders from Gordon Sherman to "straighten out." These recitations were told to me to dissuade me from buying from outside sources.

* * * * *

715 VIII Answer of Plaintiff Pierce Muffler Shops, Inc., by Joseph Pierce to Interrogatory VIII to all Plaintiffs:

* * * * *

715 e. Mr. Sherman related that he had discovered by means of a Midas ad that we had been selling
716 brake parts. He remarked about a Florida Midas dealer who had been terminated for instituting a brake installation service. He then insisted that I also discontinue my recently established brake line. He also requested that I stop selling shock absorbers and springs in my Elmira and Rome shops. I agreed not to sell the brake parts and to cease selling shock absorbers and springs in my Elmira and Rome locations.

* * * * *

VII Answer of Plaintiff Maxwell E. Ross, et al. to Interrogatory.

VII to all Plaintiffs.

* * * * *

915 Many oral conversations were held with Gordon Sherman and Lou Gurnick, with regard to "firm prices" in Battle Creek, Michigan. Tidey Auto Parts Co. was offering the same merchandise at greatly reduced prices which was hurting my position in that city. I wanted to reduce my prices so that I could be competitive. I was not allowed to do so. Letter to Gordon Sherman dated May 23, 1959 and his reply dated May 26, 1959. I was ridiculed by Gordon Sherman.

* * * * *

916 I was absolutely forbidden to handle any products
other than those purchased from Midas, Inc. At the
time I signed my franchise in Muskegon, Michigan, I was
installing automobile glass and auto springs. As a mat-
ter of fact, the springs were sold to me by Jack Brezin,
at that time the representative for Midas. I was al-
lowed to continue with this operation until shortly after
the Grand Rapids shop was opened (May 1956). I
917 was told by Mr. Brezin that I would have to discon-
tinue installing springs in Grand Rapids and both
glass and springs in Muskegon. The new "image" was a
pure Midas operation. I capitulated to the degree that
I stopped the installation of springs in both shops. I re-
fused to stop installing glass in Muskegon.

To my knowledge, none of this information outlined above was in writing. Nor do I recall any witnesses being present when conversations with Mr. Brezin were being held. Later on, when Lou Gurnick became field counsellor, additional pressures were brought to bear to make me discontinue my glass business in Muskegon. Expressions were made, such as, "Things don't look too good for you in Chicago," and "Gordon doesn't like that." Many of these conversations were held in my office in Muskegon which was adjacent to the general office of the company. These conversations were overheard by my bookkeeper, Dorothy Nisch.

I was forbidden to buy pipes, shock absorbers, etc. from anyone but Midas. I knew that other Midas operators were installing shock absorbers, and even selling a second line of mufflers at lower prices. When I asked Lou Gurnick about this I was told this was "heresy" and that these Midas dealers were going to be punished. He showed me a memo from Gordon Sherman, addressed to his field counsellors about the cancellation of a Midas franchise in Florida because the dealer had dared defy

the company and had continued to install shock ab-
918 sorbers. I finally had to discontinue my profitable glass business in Muskegon because I was not only stopped from opening up in Battle Creek but was threatened with cancellation of my franchise. I capitulated January 1, 1959.

* * * * *

919 Answer of Plaintiff Maxwell E. Ross, et al. to Interrogatory VIII to all Plaintiffs.

* * * * *

919 3. and 4. I asked Lou Gurnick, field counsellor about buying tail pipes from Texas Tailpipe Co. I had heard that several other Midas dealers were buying them. His answer was: "Forget it—Gordon wouldn't stand for it." Specifically, I received a telegram from Lou Gurnick reading as follows: "Have been advised you are not buying clamps from Midas. You know this is company policy. Please see to it that you do from now on."

5. This was said to Joe Pierce. His franchise was revoked because he would not comply. This was also implied to me by Jack Brezin with regard to installing leaf springs in Grand Rapids.

* * * * *

1039 PLAINTIFFS' INTERROGATORY 19

Interrogatory 19 is as follows:

"19. If your answer to Interrogatory No. 18 is affirmative, state the general nature of each such study, studies or investigation and set forth with reference to each (a) the general findings of each study, studies or investigations; (b) the name and address of the person or persons who conducted such study, studies or investigation; and (c) whether you have a copy of such study, studies or investigation or any documents relating thereto in your possession, custody or control."

In the first two months of 1959 and again in October of 1959, orders from Midas dealers were analyzed by
1040 or under the direction of the defendant Robert Schroeder with a view to identifying Midas franchisees whose purchases of Midas-brand pipes and clamps appeared to be very much out of proportion to their purchases of mufflers. On two occasions names obtained from such analyses were given to field counsellors to follow up. The purpose of this undertaking was threefold: (1) to give special attention to helping those franchisees who needed to learn how to sell more pipes; (2) to determine which franchisees were keeping inadequate inventories which resulted in their having to buy more "fill-in" pipes at higher prices than ~~necessary~~, and (3) to determine which franchisees were making substantial purchases of either pipes or clamps from sources other than International so that the field counsellors could make a greater effort to persuade them to make those purchases from International. A direct result was substantial reduction in the price of Midas-brand clamps, which aided the field counsellors' efforts to sell Midas-brand clamps. Documents relating to this undertaking are in the possession, custody or control of the defendants.

In some instances, beginning in 1959, Jim DuBose, an International employee whose job was to help Midas franchisees to train installers, reported non-Midas tail
1041 pipes or clamps that he had seen in Midas shops, and some documents relating to his reports are in the possession, custody or control of the defendants. Mr. DuBose presently owns a Midas shop located at 4230 South Kingshighway, St. Louis, Missouri.

*   *   *   *   *

1047 PLAINTIFFS' INTERROGATORY 21

Interrogatory 21 is as follows:

"21. State the terms under which you made any sales of automotive exhaust parts during the period to each of the persons, firms or corporations listed in your answer to Interrogatory No. 20, setting forth
1048 with particularity (a) the nature of any quantity discounts; (b) the nature of any cash discounts; (c) the nature of any freight allowances; and (d) the nature of any allowances of any other kind."

1. The terms under which sales of International-brand automotive exhaust parts were made during the period to each of the concerns listed in our answer to Interrogatory 20 were, as in the case of Midas-brand exhaust system parts, net 10th prox., freight collect. A quantity discount in the amount of 10% of total purchases was allowed to one of the listed concerns, Wellston Tires & Supply, St. Louis, Missouri; Wellston was a particularly large distributor of automotive parts, selling insofar as defendants are aware exclusively at wholesale. The terms of sale of International-brand products differ from the terms of sale of Midas-brand products in that a 2% cash discount is allowed on all International-brand purchases for which payment is timely. Some of the concerns listed in answer to Interrogatory 20 did earn and receive such 2% cash discounts in the period covered by the interrogatory.

2. The terms of sale to Midas-brand customers other than the plaintiffs are set forth in answer to Interrogatory 29 filed December 3, 1964.

• • • • •

1110 VIII. 5. Answer of Plaintiff Pierce Muffler Shops, Inc. by Joseph Pierce to Interrogatory VIII. 5. to All Plaintiffs:

5. There were several instances where the defendants advised me that unless we desisted from purchasing automobile exhaust parts from other sources of supply our agreement would be terminated. Such statements were made for the most part by Midas representatives in my office in Syracuse. Several times one or more of these representatives would enter upon my premises and begin inspecting my stock of tail pipes for any indication that I might be selling goods purchased from manufacturers other than Midas. They would take notes, often suggest or state that what I was doing was in violation of Midas policy and refer their reports to the Home Office in Illinois.

Later this was followed by a visit by Mr. Gordon Sherman sometime in 1958 or 1959, who informed me that such continued activity would be "grounds for divorce." Soon thereafter my franchise was terminated for failure to comply.

* * * * *

1111 (e) Mr. Zuckerman entered upon my premises on several occasions and began inspecting my stock of tail pipes and other goods. He would make notes as he went along which indicated whether or not I was carrying goods purchased from manufacturers other than Midas. This occurred several times during the aforementioned years. He seemed especially interested in the tail pipes which I had purchased from Texas Tail Pipe Co. and which were marked similarly to those purchased from Midas. He indicated at one of these "inspections" that my handling of other goods "did not set too good with the fellas in Chicago."

* * * * *

1112 (e) The communications by Mr. Sherman in addition to referring to our policy of selling shock ab-
1113 sorbers and springs also indicated Midas' extreme concern and displeasure over our sales of automotive exhaust parts purchased from manufacturers other than Midas, especially tail pipes. Mr. Sherman told me in this light, "Joe, this is just like cheating on your wife; it is grounds for divorce." I replied regarding his statement that I felt like I was sitting on top of a fence; I was being forced to go one way or another.

* * * * *

1142 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants (other than Irwin Liss, an individual) by their attorneys, pursuant to Rule 56 of the Federal Rules of Civil Procedure and the order of this Court dated August 13, 1965, move for a Summary Judgment dismissing the Amended Complaint with prejudice.

In support of this motion, defendants submit that the Amended Complaint, the depositions and interrogatory answers of the parties, the Affidavit and Appendix attached hereto and the exhibits and other matters of record deferred to herein demonstrate that there is no genuine issue as to the material facts set out below and that defendants are entitled to a judgment of dismissal of all three counts of the Amended Complaint as a matter of law.

1143 **1. Contractual Allegations in Counts One and Two**

Counts One and Two allege violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act arising out of Midas franchise agreements executed by plaintiffs and defendants to govern their relationship in the purchase

and sale of automotive exhaust system parts through establishments displaying defendants' trade and service marks—"Midas" and "Midas Muffler Shop." It is alleged that the terms of these agreements illegally restricted plaintiffs in the operation of the Midas Shops, but the following undisputed facts conclusively preclude plaintiffs from arguing that such agreements were illegal or were injurious to their business or property.

(a) Each plaintiff initially asked to become a participant in the Midas merchandising program and voluntarily, willingly, and knowingly executed his first Midas franchise agreement; each plaintiff thereafter sought additional shops in the Midas program and voluntarily executed additional franchise agreements for such shops; each plaintiff at all times had the legal right to abandon the Midas program and to cancel these franchise agreements; ten of the eleven remaining plaintiffs unilaterally terminated their franchises when it suited their convenience, and the eleventh threatened to do so; each plaintiff voluntarily participated and cooperated with defendants, and with all other Midas dealers, in the conduct which plaintiffs now assert was illegal and injurious to their business and property; each plaintiff accepted the benefits arising out of the franchise agreement, and each plaintiff earned substantial and significant profits during the term of such agreements. Accordingly, each plaintiff was *in pari delicto* with defendants as to the asserted illegal conduct and is barred from recovering any alleged damages from such conduct.

1144 (b) In addition to the aforesaid bar of *in pari delicto*, the franchise agreements executed between defendants and each plaintiff and the merchandising methods employed by defendants in connection therewith were reasonable and legal means to protect the various Midas trade

names, trademarks and service marks licensed to plaintiffs by such franchise agreements, and were not prohibited by the Sherman or Clayton Act.

2. Conspiracy Allegations in Count One

Activities of the corporate and individual defendants in connection with the Midas program are alleged in Count One to constitute an illegal conspiracy to restrain trade in violation of Section 1 of the Sherman Act. But the record unequivocally shows that all the actions were accomplished by Nathan Sherman and Gordon Sherman and the other individual defendants, all of whom were officers and agents of the corporate defendants, acting through the Sherman family's wholly owned corporation, defendant International Parts, and its wholly owned or controlled subsidiary corporations, also named as defendants.

Such actions did not constitute an illegal combination or conspiracy but were the legal acts of a single trader or business entity.

3. Discrimination Allegations in Count Three

Any difference in price or service, as alleged in Count Three, between purchases by plaintiffs of Midas brand exhaust parts and purchases by other persons of Midas brand exhaust parts or International brand exhaust parts from defendants did not constitute a discrimination, in that:

(a) Plaintiffs did not compete with other purchasers of Midas brand exhaust parts;

1145 (b) Plaintiffs had the ability and opportunity to purchase Midas brand exhaust parts or to purchase International brand exhaust parts;

(c) Retailers' and consumers' preference for the Midas brand exhaust parts system as a premium commodity, its inseparable and distinct guarantee, and its different metallic properties made it unlike in grade and quality to the International brand exhaust system.

Wherefore, defendants (other than Irwin Liss, an individual) request that this Court enter its order granting the Summary Judgment and dismissing the Amended Complaint with prejudice.

Dated: October 18, 1965

1191

IN THE

United States District Court

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

PERMA LIFE MUFFLERS, INC., et al., *Plaintiffs,* **v.** **INTERNATIONAL PARTS CORPORATION, et al.,** *Defendants.*	**Civil Action No. 60 C 1636**

AFFIDAVIT OF NATHAN SHERMAN AND GORDON SHERMAN

STATE OF ILLINOIS }
COUNTY OF COOK } SS:

Nathan Sherman and Gordon Sherman, being first duly sworn on oath, depose and state that:

We are individual defendants in this action, are the chief executives of all defendant corporations, and are submitting this affidavit in support of defendants' motion for summary judgment. Either one or both of us have personal knowledge of the matters set forth herein.

International Parts Corporation was organized in Chicago in 1938 by Nathan Sherman. Through the period involved in this lawsuit he was the chief executive officer of it and its subsidiary corporations. His son Gordon Sherman was his principal assistant and an officer of the

corporate defendants. Subsequent to the commencement of this lawsuit, the subsidiary corporations of International Parts, including the other corporate defendants and other corporations were merged into International Parts and its name was changed to Midas-International Corporation.

International Parts in 1938 was engaged in the distribution of automotive replacement parts, primarily exhaust system parts, *i.e.*, mufflers, tailpipes and exhaust pipes. Such items were sold, as International parts, principally to wholesalers and jobbers, who then resold them to retail outlets serving the consumer.

In 1949, International Parts acquired a majority stock interest in Powell Muffler Co., Inc., a company which was engaged in the distribution of exhaust system parts to wholesalers. In 1953, International Parts organized as a wholly owned subsidiary, the Muffler Corporation of America, a company which was engaged in the manufacture of mufflers and fabrication of tail and exhaust pipes. Its total product was shipped to International Parts or its subsidiaries, although both International Parts and Powell purchased exhaust system parts from other manufacturers.

Each of the corporate defendants was wholly owned or controlled by Nathan Sherman or members of his family. Affiants jointly managed the corporate defendants and directed the activities which the other individual defendants performed for International Parts, by whom they were employed and paid.

For many years prior to the formation of International Parts and continuing until the early 1950s, exhaust system parts were sold to the consumer almost entirely by garages, service stations, repair shops, automobile agencies and

other similar retailers. These retailers were in the business of general automotive repair and servicing and sold numerous replacement parts, of which exhaust systems were merely a portion. Normally, these retailers purchased exhaust system parts from wholesalers or jobbers, who had purchased them from distributors or manufacturers such as International Parts or its many competitors.

Prior to the 1950s, automotive replacement parts, except for tires, spark plugs and a few other items, were sold to the consumer without any individuality. Little or no emphasis was placed on brand names. Virtually no consumer advertising was used beyond point of sale material. Although they were often-replaced items, exhaust system parts had little brand significance and received almost no individual attention by any retail outlet. Most retailers sold exhaust system parts, and most other automotive replacement items, either as a simple sale of the part, or as an installed sale, in which event a separate and additional service charge was made for the installation.

Gordon Sherman joined his father's business enterprise in 1950 upon his graduation from college. His responsibility at that time was to assist generally in the management of International Parts and to learn the exhaust system business.

In late 1954 and early 1955, a change in the merchandising of exhaust system parts began to evolve. A few individual retailers had begun to specialize in the installation of exhaust system parts to the exclusion of other types of automotive repair or parts replacement. Some retailers began to attract the motorist's attention to exhaust systems by an offer to sell a muffler as an installed item, with no separate charge for installation. Significantly, the automobile manufacturers had, at this time, in-

creased the market for replacement of exhaust system parts by their introduction of the dual exhaust system in most automobiles. What occurred thereafter is the history of the Midas Muffler Shops and of the merchandising methods which were employed to create a new market for the sale of exhaust systems.

In 1955, affiants organized Midas, Inc. as a wholly owned subsidiary of International Parts; its sole asset was ownership of the various Midas trademarks, trade names and service marks. Its only additional assets since then have been its rights under the franchise agreements subsequently executed with individual Midas dealers. Midas, Inc. has had no employees, nor held title to Midas products, all of which have been sold by International Parts.

Nathan Sherman continued to divide his time between the over-all management of International Parts and its subsidiaries and the direct supervision of products theretofore sold by International Parts. Gordon Sherman was the International Parts officer who assumed direct supervision for the Midas merchandising program.

Two separate, yet totally interdependent, elements formed the basis for the Midas system that was subsequently developed: 1) a new method of distribution and merchandising; 2) national advertising.

First, International Parts decided that, rather than extend its business operations by direct ownership and management by its employees of many isolated retail outlets throughout the nation, it would continue only to manufacture and distribute exhaust parts and would franchise and assist independent owners of specialized retail outlets to sell to the consuming public. From this decision developed the nationwide chain of independently owned and operated Midas Muffler Shops.

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Second, International Parts decided upon an over-all promotional concept that would identify to the consumer the then unknown muffler with the new trade name "Midas" and the new service mark "Midas Muffler Shop." Extensive national and local advertising were used to bring about initial consumer recognition of the Midas exhaust system and the Midas Muffler Shop. Once brand recognition had been accomplished, it was still necessary to convince the consumer of the desirability of purchasing the Midas exhaust system. Accordingly, the advertising program had to educate the motorist as to the unique benefits awaiting him at the Midas Muffler Shop.

Midas was to mean a lifetime guarantee. By the purchase of one such muffler the motorist received the right to unlimited replacements for as long as he owned his car. Moreover, this guaranteed replacement was not limited to the Midas Shop from which the original purchase had been made, but the guarantee would be recognized at every Midas Muffler Shop in the nation.

Midas was to mean free installation. All that the motorist paid for was the product he received. This added service could now be given by the individual Midas dealer because he no longer absorbed the mark-up from a middleman, a wholesaler or jobber, but received direct factory shipments of exhaust parts from International Parts.

The continuing attraction of Midas to the motorist could not totally depend on the quality of the product, its unique guarantee or the free installation. A most important element in such attraction had to be the favorable image and reputation reflected by the individual Midas dealer from whom the product was obtained. Because of the ubiquitous nature of the guarantee and the ever-increasing mobility of the American consumer, each Midas outlet had to convey the selfsame image and reputation.

Automobile repair and replacement work had traditionally been done at garages, service stations, repair shops and other outlets which were engaged in all phases of automobile repair and service. Few of these retailers were experts or specialists in any one phase of automotive work. Often their premises were unattractive and unkempt. The motorist would deliver his automobile to the shop, would be advised that the work would take several hours, and would return at the later time to be told that the necessary, but unobservable, work had been done. Midas was to mean the exact opposite.

A "Midas Muffler Shop" sign was to identify a specialist in exhaust systems. The premises were to be clean and tasteful, both on the exterior and in the interior. A motorist would be told that the installation would take 15 minutes, and during this time there would be a comfortable waiting room from which he could personally observe expert workmen efficiently remove the old exhaust system and install the bright golden Midas muffler.

National and local advertising of "Midas" and "Midas Muffler Shops" was undertaken in 1956 by International Parts and by the individual Midas dealers. All channels of communication were employed: television, radio, billboards, newspapers and magazines. A detailed explanation of this national advertising program, including the specific programs, magazines and other media, has been set forth in defendants' answer to plaintiffs' Interrogatory 38. A total of $3,570,424 was spent for national advertising of the Midas exhaust system from January 1, 1965, to December 31, 1960. Midas dealers were licensed to advertise the various Midas trade names, trademarks and service marks, and the dealers' total expenditures for local advertising of these names and marks paralleled International Parts' national advertising program.

Since each dealer licensed to use the "Midas Muffler Shop" service mark was an independent businessman, several steps were taken to assure the public, and also to insure the participating Midas dealers, that everyone involved in the Midas program would perform in accordance with the Midas image. Each prospective Midas dealer was fully advised as to the nature of the program and of the need to commit himself to conform his prospective shop operation to the operation of each other dealer. To implant in each dealer the seriousness of this voluntary commitment, and also to convey to the dealer the right to use the trademark, trade name and service mark, the License and Sales Agreement was signed by each dealer.

Verbatim copies of the franchise agreements used during the period that the plaintiffs continued in the Midas program were attached to plaintiffs' Complaint and to defendants' Answers. No fee or payment was required or received from any dealer in consideration for the right to use the Midas name. Each dealer retained complete ownership of the premises where he operated. Each dealer had the right to cancel the franchise agreement on thirty days' notice. No restriction was placed on the dealer's right, upon cancellation, to continue in the muffler installation business at the exact location from which he had operated a "Midas Muffler Shop."

Many prospective Midas dealers were unfamiliar with the exhaust system business and some were inexperienced in any business venture. Such individuals required assistance in establishing their new business as well as continuing counsel in how to manage the business and thereby prosper. An International Parts employee initially assisted most new dealers in selecting a suitable location and in arranging an equitable lease. Insurance, furnishings, equipment, hiring of employees, and all of

the other necessary provisions to start a business were arranged with the assistance of International Parts. Many dealers were brought to Chicago or to other Midas Muffler Shops to familiarize them with the actual operation of such a shop. Early in the Midas program, a new and specially chosen group of International Parts employees were designated as Midas field counselors. These eight men moved throughout their territories securing locations, placing dealers in business, giving them their initial instructions, helping them with their personnel, guiding and coordinating their advertising, and interrelating their needs with defendants' services to them.

Many miles separated most Midas dealers from other Midas Shops, so that there was little opportunity for dealers to exchange the valuable experiences each encountered in the operation of his own shop. By 1957, 120 Midas Muffler Shops were in operation, and in March of that year International Parts provided the necessary forum—the first national convention of Midas dealers. Subsequent years saw both national and regional meetings at which dealers met and discussed the efforts in which they were mutually involved. Several of the present plaintiffs spoke at one or more of these meetings.

As the number of Midas dealers increased, a select group of ten Midas dealers from various sections of the country was requested to confer periodically and consider methods to improve Midas, thereby assisting each participating dealer. This group was called the National Advisory Council; each of the individual plaintiffs voluntarily served on this Council. An additional medium for communication between the separate Midas Shops was provided in The Dealer Dabbler, a magazine which International Parts published and distributed to each Midas dealer. Two of the present plaintiffs have contributed articles to this magazine (PX 30 and PX 36).

Most of the individuals who entered the program paralleled the expansion of the present plaintiffs and after their first franchise they opened additional shops. By the time plaintiffs terminated their franchises in 1959, there were 268 Midas Muffler Shop dealers, the vast majority of whom enjoyed success and prosperity.

NATHAN SHERMAN

GORDON SHERMAN

SUBSCRIBED AND SWORN to before me, this eighteenth day of October, 1965.

DAVID J. GIBBONS
Notary Public

The material from page 73 to and including page 105 has been printed at Respondents' request. Petitioners do not believe that this is material which is part of the record inasmuch as it represents nothing more than Respondents' editorialized account of what the record shows. Record references within this material do constitute a part of the record.

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IN THE 1203

United States District Court

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

PERMA LIFE MUFFLERS, INC., et al.,
Plaintiffs,

vs.

INTERNATIONAL PARTS CORPORATION, et al.,
Defendants.

Civil Action No. 60 C 1636

APPENDIX

This Appendix contains a separate chronological summarization with respect to each plaintiff. The record references throughout relate to a specific page, *e.g.,* (100), of the plaintiff's deposition testimony, except where such reference specifically identifies another record source, such as (Dep. G. Sherman p. 100) or (Plaintiff's Interrogatory Answer IV). After the initial depositions a further production of documents by plaintiffs was necessary, and when this was completed each plaintiff appeared for a supplemental deposition, which testimony is identified by the letter "S," as (S. 100). Documents produced by plaintiffs or defendants and marked at depositions are identified as (DX 100) or (PX 100). All deposition transcripts and exhibits have been filed with the Court.

Throughout the Brief in Support of Defendants' Motion for Summary Judgment the factual statements therein are referenced to the exact page of this Appendix, as (App. 1).

I.

GREGORY T. SKARUPA

Gregory Skarupa is the alter ego of four plaintiff corporations[1] owned by him and his wife (4-8). These corporations, from March 1956 to February 1960, operated Midas Muffler Shops in the Washington, D.C., area.

Pre-Midas

Skarupa became a resident of Washington, D.C., in 1939 when he was employed as a clerk and messenger by a government agency (10-11). In 1955, while employed by the Veterans Administration, he visited his brother-in-law's muffler shop in Cincinnati, Ohio, and since it appeared profitable Skarupa decided to open a similar shop (14-15, 17). Skarupa had no prior business experience with automotive exhaust systems or allied automobile products, but his military service had given him a familiarity with automobile parts (13).

His brother-in-law was then purchasing and installing International Parts exhaust systems, and he arranged a telephone introduction between Skarupa and Gordon Sherman (15-16). About September 1955, an International Parts salesman contacted Skarupa and discussed Skarupa's desire to duplicate the Cincinnati operation in the Washington, D.C., area, whereupon the International Parts

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[1] Those corporations identified in paras. 16(A) through 16(D) of the Amended Complaint, as Perma Life Mufflers, Inc., Perma Life Mufflers of Arlington, Inc., Perma Life Mufflers of Prince Georges County, Inc., and Perma Life Muffler Shops of Alexandria, Va., Inc. (R. 15)

salesman agreed to help Skarupa start in business (16, 18, 20). Without contacting any other manufacturer, Skarupa began to look for a shop, and within about five days he had decided upon a location in Wheaton, Maryland (20, 22-23). By October 15, 1955, he had contacted an attorney, formed Perma Life Mufflers, Inc. and had the official opening of his Perma Life Muffler Shop (8, 23-24). His investment in this instance was $5,200 (128, S. 27). His full-time employment with the Veterans Administration continued (12).

First Midas Franchise

From October 1955 to March 1956 Skarupa purchased and installed International exhaust systems (29), even though he understood that he could have handled any brand he desired (293). Although it was not until March 1956 that Skarupa first discussed with defendants the new Midas program which was then being introduced (16, 27, 29), he had previously discussed the proposed national chain of Midas shops with his brother-in-law (16-17). Gordon Sherman subsequently visited Skarupa's shop and discussed the Midas franchise requirements (29-30), the proposed national advertising (32), and the national guarantee which would be honored by each member of the chain (32-33). Skarupa's only concern was to obtain a franchise for the entire Washington metropolitan area in order that he "could reap the benefits of such development" (30, 35). Although he noticed other requirements in the franchise agreement, in his "heat of going into a new program" the only portion that concerned him was the geographical area of his franchise (35).

After this conference a franchise agreement was prepared and signed on April 10, 1956 (DX 13, 31-32). Skarupa examined this franchise "in detail," including the

provisions on purchases, 2% advertising surcharge, prices and payment terms (46-47). He understood that the franchise related to the Midas trademark (47) and that an International Parts purchaser, which he then was, was not governed by the Midas franchise or merchandising methods (292). Although the Midas terms of payment were 10 days, Skarupa initially received an extended period of payment by use of 30, 60 and 90 day notes to help him get started (173-74).

Expansion in Midas

Skarupa's shop in Wheaton was profitable throughout 1956 (135) and within a short time after its change from a Perma Life Muffler Shop to a Midas Muffler Shop Skarupa was looking to expand to a second location. On December 1, 1956, he signed a second Midas franchise agreement covering a shop at Arlington, Virginia (DX 16). About $1,000 of Skarupa's personal funds were invested in this second shop (130).[2] His full-time employment at the Veterans Administration continued (12).

Almost immediately after this second Midas shop opened, Skarupa began thinking about a third shop, in Prince Georges County, Maryland (135), and on May 6, 1957, a franchise agreement was signed for a Midas Shop located in Cottage City, Maryland (DX 17). The capital investment in this instance was about $2,500 (136).

All three Midas Shops were then profitable (137), even though Skarupa was still a full-time employee of the Veterans Administration (12). His personal commitment to these business ventures amounted to a visit to a different shop every evening after his departure from his "regular employment," a visit and inspection of each shop on Satur-

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[2] Skarupa's financial success by 1958 allowed him to purchase for $55,000 the building in which this Arlington shop was located (129).

day, plus the necessary bookkeeping work which he did in the evenings (144-45). Skarupa's personal investment in his three Midas Shops was $8,800; although he was only a part-time Midas dealer, by 1957 he had received over $35,000 in wages as a corporate officer and in pre-tax corporate profits (DX 117-18).

In the fall of 1957 Skarupa began to look for further expansion into Alexandria, Virginia, and he was then advised that he would have to honor the Midas franchise provision that the owner devote full time to operation of the shop (137-38). In March 1958, Skarupa left the Veterans Administration, and with defendants' assistance he located a site in Alexandria and opened his fourth Midas Shop on July 30, 1958 (DX 18, 137-38). His capital investment in this shop was about $1,000 (139).

Advertising and National Participation in Midas

All of Skarupa's Midas Shops had the "Midas Muffler Shop" sign outside the buildings and Midas point of sale material within the buildings (132-33). Skarupa "advertised extensively in order to get the business started" (126) and his local advertising continued throughout his relationship with defendants. The printed advertisements and radio or television script that he used prominently emphasized "Midas," "Midas Muffler" and "Midas Muffler Shops," "Unconditional Factory Guarantee," "Specialists" and "15 Minute Service."[3]

The marketing area for Skarupa's four shops was confined to the cities and counties in which they were located[4]

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[3] Skarupa's Answer to Interrogatory IV has 26 sample advertisements attached to it. (R. 461-65; R 471-91)

[4] Skarupa's Answer to Interrogatory V. (R 493)

(187-88), and he was not in competition with any of the other plaintiff dealers (302-03). Even so, Skarupa's personal involvement with the Midas merchandising methods extended beyond the Washington, D.C., area. He became a member of the original National Advisory Council and served with that group until March 1958 (166). At one of the conventions of Midas dealers Skarupa gave a formal presentation (165). He was also a contributor to The Dealer Dabbler in which he took exception to a prior article by plaintiff Maxwell Ross (PX 36).

Desire to Expand

After the Midas Shop in Alexandria opened, Skarupa sought "to open up additional shops" (56) since he thought that three additional shops could be established in the Washington area (316). However, in late 1958, he was allegedly told that he could not expand further (162) and that other Midas dealers were to be established in the Washington area (57). At a meeting with Gordon Sherman in early 1959 Skarupa discussed his desire to expand his Midas operation further (59). According to Skarupa, he was offered one more Midas franchise but was informed that additional franchises in that area would go to other dealers (59).[5] Such an arrangement was unacceptable to Skarupa since it did not protect him from possible competition (59). After this conference Skarupa did not again discuss with defendants the question of his opening more Midas Shops (S. 42).

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[5] One of defendants' purported objections to Skarupa's further expansion was that he "was making too much money" and would need investment advice (60). DX 119 shows that for 1958 Skarupa's personal corporate salary for nine months' full-time effort was $44,000 and his corporate profit was an additional $23,109, for a total of $67,109.

During this same late 1958 and early 1959 period Skarupa encountered other actions by defendants which he considered unacceptable. The credit allowed to the dealer upon return of a muffler had been reduced in January 1959, and the new Midas muffler, according to Skarupa, was no better than the original muffler and in some instances inferior (167-68). In April 1959, Skarupa began to install shock absorbers which he purchased from a former sales representative for International Parts (202).

Solicitation by Competitors and Abandonment of Midas

A Robin Hood representative for Maremont Corp., Bert Herskee, contacted Skarupa in the spring of 1959 (195).[6] He had known Herskee when Herskee was previously employed by International Parts (195). Herskee advised him that Maremont was going to start a chain of Robin Hood muffler shops and explained the purported advantages to a Midas dealer who would switch to that franchise, emphasizing the paramount atraction to Skarupa—an exclusive franchise for the entire Washington metropolitan area (196-97).

Periodically thereafter Skarupa was visited by Herskee and urged to sign a Robin Hood franchise agreement (197).[7] In late November 1959, Skarupa decided to abandon Midas and change over to Robin Hood (189-90, 194-95, 197). On December 11, 1959, Skarupa exercised his right to terminate

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[6] Robin Hood is the brand name for exhaust systems sold by the Maremont Corp., a competitor of defendants (194-96).

[7] Solicitation of Skarupa by defendants' competitors was not limited to Maremont. In 1958 the president of the Texas Tail Pipe Co. telephoned Skarupa to solicit his business (273-74). Skarupa described such solicitation as a "regular stream of salesmen" (270).

the Midas franchise agreements (DX 25). His reasons for termination were defendants' refusal to allow further expansion, the proposed competition from new Midas dealers in the Washington area, and the restriction on purchases (190-91). Eight days later Skarupa signed the Robin Hood franchise agreement (DX 105), and the first delivery of Robin Hood mufflers was phased to arrive the day after the Midas termination was effective (204). All of the Midas trademarked parts were returned to defendants (204).

Post-Midas Experience

When Skarupa left the Midas program on February 11, 1960 (70), his four Robin Hood shops began to sell many of the allied automobile products described in the Amended Complaint (216, 219, 241). Since Robin Hood gave no guarantee to the consumer, Skarupa began to issue his personal guarantee (200). Within this first fiscal year, 1960, each of his four former Midas Shops operated at a loss[8] for a total of approximately $13,700 (222, 243). His loss in the second year, 1961, was approximately $30,000 (243).[9]

In early 1962 he decided to get rid of the business (254), and by February 12, 1962, he sold all four shops for about $70,000 (10, 257). Two years as a Robin Hood dealer had necessitated that Skarupa return to his former employment at the Veterans Administration.

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[8] Skarupa characterized his problem as "related to a relatively unknown name to the public" [*i.e.*, Robin Hood] and admitted that for motorists the name Midas provided "more reliance and dependence" (318).

[9] The corporate federal tax returns for 1961 show a total loss of $31,076 (DX 64, 65, 66 and 67).

Midas Profits

Skarupa's financial experience in the four Midas years, 1956 through 1959, was significantly different. His corporate profit and personal wages totaled $182,763.31[10] from a personal investment of $9,800[11] and only a part-time commitment of his own time for over half the period. When in 1958 he gave up his government position and became a full-time Midas dealer his corporate and wage income totaled $67,109, consisting of personal wages of $44,000 and corporate profit of $23,109 (DX 119). For 1959 his income was $80,607, consisting again of personal wages of $44,000 and a corporate profit of $36,607 (DX 120). Skarupa's personal wages for *each* of the years 1958 and 1959, $44,000, *exceeded* his total personal income for all of the six years prior to Midas.[12] These profits were actually increased by about $18,000 for 1958 and 1959 since the rent expense (DX 109 and DX 113) for Skarupa's Midas Shop in Arlington, Virginia, was in part a payment to Skarupa since he had purchased that building (129).

For these four years Skarupa voluntarily continued in the Midas program,[13] he received approximately $200,000

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[10] 1956 shown on DX 107 and DX 117; 1957 shown on DX 118; 1958 shown on DX 108 through DX 111 and DX 119; 1959 shown on DX 112 through DX 115 and DX 120.

[11] Skarupa's Answer to Interrogatory III.

[12] Skarupa's Answer to Interrogatory XV shows that his pre-Midas income for 1950 through 1955 was between $5,000 and $7,700 per year. (R. 881)

[13] Skarupa estimated that he serviced about 57,000 automobiles during his period with Midas (97).

1212 in profits. By this suit he seeks to recover an additional profit of $843,132.[14]

Conspiracy Allegations

No basis for the alleged conspiracy among the corporate divisions of International Parts and their officers and agents was testified to by Skarupa. He acknowledged that any documentary evidence relating thereto would have been within documents he produced (77-79), yet none of these documents support this assertion. The only conspiracy which he alleged was an understanding that he and all the Midas dealers were to follow the price lists (74-75).

II.

MAXWELL E. ROSS

Maxwell Ross and his relationship with defendants from late 1955 until late 1959 provided the factual setting for the allegations made by five plaintiffs,[15] through which Ross operated four Midas Shops located in Muskegon, Grand Rapids, Kalamazoo and Battle Creek, Michigan, and two in Minneapolis, Minnesota. Ross and his wife were the sole owners of these business enterprises and Ross was the chief executive (28-29).

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[14] Skarupa's Answer to Interrogatory II. He seeks an additional amount in damages because of the restriction on his further involvement in the Midas Program by not being able to open three more Midas Shops (310-11, 316-17). (R. 449-57)

[15] Those plaintiffs are identified in paras. 16(E) through 16(I) of the Amended Complaint as: Robin Hood of Grand Rapids, Inc.; Robin Hood of Muskegon, Inc.; Regina M. Ross, assignee of Maxwell F. Ross, t/a Robin Hood Muffler Shop; Regina M. Ross, assignee of Maxwell E. Ross, formerly t/a Midas Muffler Clinic of Minneapolis; Regina M. Ross, assignee of Maxwell E. Ross, formerly t/a Midas Muffler Shop of Battle Creek. (R. 15-16)

Pre-Midas

Prior to 1951, Ross did accounting work and had business experience as the organizer of a concern which sold automobile car polish (4-7). Beginning in 1951 he was the sole proprietor of Heights Auto Parts Co., an auto parts and wrecking business located in Muskegon, Michigan (7-8), which concern sold new and used auto parts, including exhaust systems which it purchased from International Parts (10, 14, 21). In Ross' sales of exhaust systems at that time "brand names were not important" (24). In November 1955, Ross acquired a new location in Muskegon for his auto parts business (20).

First Midas Franchise

In late 1955, Ross discussed with an International Parts salesman the Midas merchandising method which Ross described as the "new concept" of selling an exhaust system under a "free installation" approach to the consumer (224). The Midas concept—the guarantee, the national advertising, and the quick service of 15-minute installation—"excited" him (239-40). He recognized this as a good idea, "a magical term," and thought "it was a way of making some real money" (239).

Ross was then purchasing International brand exhaust system parts, and he was cognizant of the different methods whereby International Parts merchandised its International brand and its Midas brand, including the different terms of sale and an additional 2% surcharge for national advertising of the Midas brand (229-30).

After his exposure to this "new concept" (224), Ross investigated it further and inspected a Midas Shop in Milwaukee, Wisconsin, to find out "the things a person would normally want to know" before going into such a business

(226). Ross thinks that he may have consulted an attorney at this time (361-62). Within a month, December 7, 1955, Ross read and signed his first Midas franchise agreement (237, DX 9 and DX 10), and on December 15 he started installation of the Midas exhaust systems (36).

Expansion in Midas

Thereafter Ross sought to expand his Midas operation and to open additional shops in other cities in Michigan and Minnesota. His first expansion occurred within six months when he opened a Midas Shop in Grand Rapids, Michigan, and executed his second Midas franchise agreement in May 1956 (39-40, 120). Several months later, and still within a year of his first knowledge of Midas, Ross extended his operation to Minnesota with the opening in October 1956 of a Midas Shop in Minneapolis (42-43). At that time, Ross sought an exclusive franchise for all future Midas Shops in Minneapolis and St. Paul (44), even though he had never before engaged in business in that area (127). In May 1957, Ross expanded his Minneapolis operation with the opening of his fourth Midas Shop and his second in that city (47).

By April 1958, Ross had sold one of his Minneapolis shops (127-29), and his other Minneapolis shop was closed in August 1958 (185). Contemporaneous with closing his Minnesota operation, Ross in April 1958 purchased a Midas Shop in Kalamazoo, Michigan (168-69). He operated this Kalamazoo shop for about a year when he decided to seek a better location, and after consultation with the Midas architects (170-71) he constructed a new building in Kalamazoo "in keeping with the Midas concept" (62). Approximately three months after the new shop had been operating he recognized that there was need for only one shop in Kalamazoo and closed the original shop (172-73).

In May 1959, Ross again expanded his operation when he opened his fourth Midas Shop, in Battle Creek, Michigan (55).

Geographically, the market area for Ross' four Midas Shops encompassed the Michigan counties of Muskegon, Kent, Kalamazoo and Calhoun (278-79).[16] He described his sales impact in these areas as "tremendous" because of this "effective" and "novel" concept (281). His volume of business during 1959 increased to the point that he purchased a tractor and trailer to transport Midas merchandise from Chicago to his four shops throughout the Michigan area (231-32).

Advertising and National Participation in Midas

Ross recognized that advertising of the Midas exhaust system made a significant contribution to his market "impact," that Midas originated direct consumer advertising of mufflers, that by such advertising "the Midas story had become known" and created a public "demand," and that such advertising had given Ross the valuable image of "more substance" and "more credibility" (212, 313, 322, 427). Ross' shops displayed "the Midas sign identification" (268).

To supplement the Midas national advertising which reached his area (390-391), Ross employed local advertising[17] using material furnished by defendants (306),

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[16] Interrogatory Answer V states "city or county in which each" shop was located. (R. 911)

[17] A detailed statement of Ross' advertising of the Midas trade name and service mark is contained in his answer to Interrogatory IV. (R. 907-10)

and it was successful (302) to the extent that he "was known as Mr. Midas" (S. 202).

Ross' involvement with Midas and its merchandising methods during the four-year period of his franchise agreements was not limited to his own shops. In early 1957, Ross became one of the original ten members of the dealers' National Advisory Council (284). According to Ross, the purpose of this Council was the formulation by dealers of "ideas and patterns of operation to produce the optimum profit for each Midas operator" (288). He characterized himself and the other dealers as initially being "guinea pigs" (303). His own contribution to the Council and to all Midas dealers was the help he gave to create the Midas field counselor (287), whose function was to visit the shops and help improve them (290). As late as May 1959, Ross had a letter published in The Dealer Dabbler wherein he circulated suggestions to all Midas dealers (PX 30).

Desire to Expand

Significant success came to Ross' new shop in Kalamazoo whereupon he decided to expand by opening a second Midas Shop in Grand Rapids (172-73). Ross, in early 1959, "liked the program," so much that he offered to construct two new buildings in Grand Rapids and then to vacate the older premises where he was then operating a "very prosperous shop" (172-74).

During this same period Ross became displeased with certain actions of defendants. He encountered hesitancy from defendants in concurring with his desire to add another outlet in Grand Rapids (172). Just prior to this time Ross had disagreed with defendants over the return

of merchandise involved in his purchase of the Midas Shop in Kalamazoo (170). He was unhappy with the change in the muffler replacement credit to the dealer which had become effective in early 1959 and which in Ross' judgment had become prohibitively expensive (179).

Solicitation by Competitors and Abandonment of Midas

In early 1959, Ross spoke with an unnamed Robin Hood[18] representative concerning the possibility that Ross terminate his relationship with Midas and that he affiliate with the Robin Hood franchise system of selling exhaust systems (161-62).[19] Subsequently Ross was visited by Bert Herskee, a former Midas field counselor who was then the sales manager for Robin Hood, and Ross was again solicited to abandon Midas and convert to Robin Hood (162-63). Among the enticements offered to Ross was the exclusive Robin Hood franchise for the entire State of Michigan, a second line muffler, and the availability of merchandise at a cheaper price (163).

When Herskee again solicited Ross in October 1959, Ross agreed to terminate his Midas franchises and to change over to the Robin Hood program (166-67). On November 13, 1959, he exercised his contract right and sent a letter to defendants terminating his Midas franchises (146-47, DX 6 and DX 7). He tried to sever all connections, including the return of merchandise, within thirty days (315).

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[18] Robin Hood is the brand name for exhaust systems sold by the Maremont Corp., a competitor of defendants (151).

[19] Ross characterized the Midas Shops as being known in the trade as "a successful organization individually and collectively." He was contacted and solicited all through this time by defendants' competitors (396-97).

1218

Post-Midas Experience

On December 13, 1959 (150), Ross began to sell exhaust systems as a Robin Hood dealer. He continued to operate his four shops in substantially the same manner, the only change being the introduction of shocks and springs (152). Although Ross obtained a franchise agreement from Maremont as the exclusive Robin Hood dealer for the State of Michigan, he did not open any additional shops (152). Under the Robin Hood program, no written guarantee to the consumer was issued by the manufacturer (S. 172), and so Ross issued his personal guarantee to the customer which he described as approximately the same as the Midas guarantee (164).

Without dispute, as a Robin Hood dealer Ross was financially unsuccessful (315). Robin Hood had no national significance and had never "spent the kind of money on national advertising that Midas did" (319-20). Ross spent a good deal of money advertising the Robin Hood program (337). Two former Midas Shops closed in the first year, Battle Creek in August 1960 and Kalamazoo in December 1960(185-86). For his first fiscal year as a Robin Hood dealer, July 1960,[20] Ross had a corporate loss of $20,165 (DX 184). Grand Rapids closed in October 1961 and Muskegon in December 1961 (325). In two years his former Midas Shops were out of business.

Midas Profits

Significant and undisputed financial success came to Ross during his four years as a Midas dealer.[21] In the fiscal

[20] Ross had a fiscal year for all his business ventures of August 1 through July 31.

[21] Ross' income tax records for the period prior to 1955 are not available (Ross' Interrogatory Answer XV). (R. 9+2)

year ending July 31, 1956, during which time he operated his wrecking business and opened his first two Midas Shops, he had a net profit of $21,139 (DX 179). During the fiscal year ending July 1957 his profit had risen to $75,961 on his Michigan shops, with an over-all profit of $52,716, limited by the losses on the distant operations in Minnesota (DX 180). During the next fiscal year Ross incorporated his various shops and in July 1958 had a total profit of $41,198, consisting of a pretax corporate profit of $20,398 plus a personal income as a corporate officer of $20,800 (DX 181). For the 1959 fiscal year Ross had a total profit of $39,313, including a pretax corporate profit of $18,513 and a personal income of $20,800 (DX 183).

In four fiscal years Ross made approximately $154,000 as a Midas dealer. By this lawsuit he seeks an additional $488,400[22] in alleged unobtained profits for this same period.

Conspiracy Allegations

Ross' knowledge of the alleged conspiracy among defendants was based solely on the relationship between International Parts and Midas (98).[23] He admitted that he knew of no events relating to the alleged conspiracy (394-95) and that he had turned over to his counsel all documents relating thereto (97).

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[22] Paras. 41(E) through 41(1) of the Amended Complaint. (R.15

[23] Ross admitted that he did no business with the defendant Powell Corp. and that none of his competitors were customers of Powell (409). He never mentioned defendant Muffler Corp.

III.

JOSEPH PIERCE

Pierce Muffler Shops, Inc. was the corporate structure through which Joseph Pierce, from April 1956 to September 1959, operated seven Midas Muffler Shops in the upstate New York cities of Binghamton, Syracuse, Utica, Rome, Elmira and Mattydale.[24]

Pre-Midas

Pierce was a lifetime resident of the Syracuse, New York, area and has been in business there for many years (2-5). Western Auto had a dealership program, and in 1937 Pierce opened one such store in Fulton, New York (4-5). He continued in this business until 1946, during which period he opened additional Western Auto stores in Oswego and Baldwinsville (5). J. C. Pierce, Inc., not the present corporate plaintiff, was formed in 1947, and thereafter Pierce added retail stores in Syracuse, Rome, Canastota, Cortland and North Syracuse (6-10). These stores handled many automotive and non-automotive products, including International brand exhaust systems, but Firestone tires were their major item (11-14). Pierce sold his retail stores in Canastota, Cortland and North Syracuse in 1951 and the store in Syracuse in 1952 (27-28). A fire destroyed the Baldwinsville store in 1960, so Pierce, through his separate non-party corporation, now operates retail stores only at Fulton and Rome (28).[25]

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[24] It is identified in para. 16(M) as Pierce Muffler Shops, Inc., formerly Midas Muffler Sales & Service, Inc. (R. 16)

[25] Throughout the subsequent period of Pierce's operation of Midas Muffler Shops, he sold International brand exhaust parts from these retail stores (47).

In 1954, J. C. Pierce, Inc. diversified and established a new division, Muffler Sales and Service (19). Pierce had prior experience installing mufflers and shocks at his retail stores and he then felt that "there was a future to the muffler installation business."[26] Exhaust systems which Pierce was then selling were purchased from International Parts, and he discussed with an International Parts representative "opening a specialized muffler installation shop, muffler, springs and shocks" (22). Assisted by the International Parts representative, Pierce found a suitable location in Binghamton for his first muffler shop (22).

Pierce expanded his muffler installation business in September 1955 by opening a second shop in Syracuse (29, 31) and a third shop in Utica; these three shops were then consolidated into a separate corporation, Muffler Sales and Service, Inc. (30-32). In April 1956 the corporate name was changed to Midas Muffler Sales and Service, Inc. (36-37) and subsequently changed to Pierce Muffler Shops, Inc. (19), the present plaintiff. This corporation is owned by the Pierce family (50).

First Midas Franchise

Midas was first discussed by Pierce and an International Parts representative in February or March 1956, at which time Pierce visited a Midas Muffler Shop in Buffalo (38, 46) and discussed the Midas program with the shop owner (43-44). Pierce was informed that Midas Shops were to be opened in upstate New York and that existing purchasers from International Parts were to be given the first opportunity to obtain the new franchises (39). "So as not to

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[26] Pierce's personal income for 1953 through 1955 was, respectively, $20,028, $17,977 and $9,929 (Pierce's Interrogatory Answer XV). (R. 767)

invite competition," Pierce signed his first Midas franchise agreements on April 1, 1956, for the three existing Pierce Muffler Shops in Binghamton, Syracuse and Utica (39, 54-56, DX 46, 47 and 52).[27]

Expansion in Midas

By June 1956, Pierce had opened his fourth Midas Shop, a second shop in Syracuse (36). His expansion continued, and by May 1957 he had obtained locations in Rome and Elmira and signed Midas franchise agreements for these two shops (36, DX 49 and DX 50). Sales by these shops had increased to such an extent by 1957 that Pierce opened a warehouse for his Midas operations in Syracuse (24-25). Without even asking defendants for another Midas franchise agreement, Pierce renewed his expansion in 1958 and opened his seventh Midas Shop, in Mattydale, a suburb of Syracuse (34, 36, 81).[28]

Advertising and National Participation in Midas

Pierce's shops were identified by the "Midas Muffler Shop" signs (111). There were Midas display cards and advertising material at all locations (113-14). Like the other plaintiffs, Pierce used Midas advertising material in his local advertising. A typical TV script advised the

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[27] Pierce acknowledged that he read the franchise agreements before signing them (134).

[28] On one occasion Pierce had a prospective Midas dealer at one of his shops and explained the Midas program to him and "told him I was enthused about it" (132). Later, Pierce brought a personal friend to defendants' headquarters in Chicago to inquire about a Midas franchise (91-92).

motorist to "depend on Midas for the world's finest mufflers, tailpipes and exhaust systems."[29]

His involvement with the Midas concept was, like Ross and Skarupa, nationwide in that Pierce was also a member of the National Advisory Council (96).[30]

Pierce's Threats of Termination

Pierce was unhappy with the reduction from 100% to 50% on the credit to the dealer on the guarantee, which became effective on January 1, 1959. After two months' experience under the revised credit program he wrote Gordon Sherman and formally complained about the additional expense (DX 53). After reciting his displeasure with the quality of the Midas muffler, Pierce alerted Sherman as to his future plans by threatening: "I am writing you in all fairness and stating my dissatisfaction with the present program. If I should decide to make a change in the future I would like this to go on record as to the reason why" (DX 53). Subsequently, he voiced the same opinion to Midas field counselors who called on him (184), and in one such conversation Pierce indicated that he was thinking of taking on a different brand of mufflers (S. 123).

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[29] Pierce's local advertising expenditures and samples of other TV and radio scripts and newspaper mats are attached to Interrogatory Answer IV. All emphasized the Midas guarantee, the coast-to-coast service from exhaust specialists, and the Midas image of "clean, quick and courteous service." (R 628-92)

[30] The market for Pierce's Midas Shops was limited to the cities and counties in which they were located (Pierce's Interrogatory Answer V), and he was not in competition with other Midas dealers (334). (R 643)

1224 At various times throughout this period Pierce's Midas Shops sold and installed certain "allied automobile products" (121-23; 126-29). Although his practice of installing non-exhaust system parts was discouraged by the Midas field counselors, Pierce acknowledged that he was never threatened with termination of his franchises (319). During a personal conversation with Gordon Sherman, Pierce was told: "Joe, I will never tell you not to sell shocks and springs" (163). Pierce crystallized the field counselor's comments on his sale of non-exhaust system parts: "if I wouldn't [discontinue], there was not much he could do about it; all he could do was make his report" (160).

Using his Midas Muffler Shops as an outlet, Pierce began, in 1958 or 1959, to sell Nu-Era Mufflers from all his locations (152-53, 305, S. 134-35). Pierce acknowledged that he issued a guarantee on these mufflers that did not differ from the Midas guarantee and that he did not know whether the customer knew whether he received Pierce's guarantee or the Midas guarantee (153-54).

Termination of Pierce

About March 1959, Pierce was contacted by defendants' Chicago office after he placed a large order, and he was advised that the balance in his account was too high and that the shipment would be C.O.D. unless Pierce cleared up his account (240). In about June 1959, Pierce requested that his franchise on the Midas Shop in Elmira be terminated in order that he could operate independently and sell allied automobile products (198-99).

Midas executives, since the letter of February 25, 1959, had been concerned about Pierce's threat of cancellation and had also been aware of the large balance existing in Pierce's account (Dep. G. Sherman pp. 310-13). When the balance on Pierce's account had been reduced, defend-

ants exercised their right of termination by notice given on October 27, 1959 (Dep. G. Sherman p. 311, DX 55). Subsequently, Midas merchandise was returned to defendants by Pierce (225-26).

Post-Midas Experience

Following the termination of the Midas franchise agreements, Pierce was contacted by Herskee and offered the Robin Hood franchise program (352-53). Pierce was not interested in any franchise but agreed to purchase Arrow brand mufflers[31] from Herskee on the understanding that no Robin Hood competition would enter Pierce's market area (353-54). Pierce changed his operation by advertising shocks, springs, and second-line mufflers (243), and by subsequently closing three of his former Midas shops. He closed his Rome shop in 1960, sold his North Syracuse shop in 1961, and closed his Binghamton shop in 1962 (246).

Midas Profits

A fiscal year ending on September 30 was employed by the Pierce corporation.[32] Six months operation as a Midas dealer was included in the fiscal year ending September 1956, for which year Pierce had a gross profit of $31,311, consisting of pretax corporate profits of $17,269 and Pierce's personal wages from these operations, which does not include his wages from the J. C. Pierce, Inc., of $14,042 (DX 164). For the next fiscal year, ending September

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[31] Pierce did not believe there was any difference between the Robin Hood brand and Arrow brand mufflers (355).

[32] No separate financial statements on the individual Pierce shops are available (S. 113).

1226
1957, the comparable profit and wages were $16,454 and $12,000 for a total income of $28,454 (DX 165). By September 1958, the pretax corporate profit had risen to $26,778, and Pierce's personal wages had increased to $33,985 (DX 166). To this 1958 profit an additional $15,000 must be added as "a transfer of profit" to another of Pierce's corporations for a fiscal year total income of $75,763.[33] Fiscal year ending September 1959, Pierce's last complete fiscal year as a Midas dealer, brought a total profit of $45,619, consisting of a pretax corporate profit of $27,919 and personal wage of $17,700 (DX 170).

Profits of approximately $180,000 resulted from Pierce's relationship with the Midas program, and by this action he seeks to recover an additional $502,700, as requested in paragraph 41(M) of the Amended Complaint, or an additional $1,305,826, as computed by his answer to Interrogatory II. (R. 155; R 617-26)

Conspiracy Allegations

Pierce's knowledge of the alleged conspiracy was limited to the agreements between Midas, Inc. and the numerous Midas Muffler Shops and International Parts and the International dealers (284). All of the documents which he had relating to this claim were supplied to his attorneys (73-74).

IV.

CLAUDE D. WHEELER

Claude Wheeler, during the three-year period from September 1956 to November 1959 operated Midas Shops as a sole proprietor.[34] Two shops were located in St. Louis, Missouri and a third shop in East St. Louis, Illinois.

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[33] Pierce Interrogatory Answer III. (R 585)

[34] He is identified in para. 16(J) as Claude Wheeler, t/a Robin Hood Muffler Shops, formerly Midas Muffler Shops, an individual. (R. 16)

Pre-Midas

From 1943 to 1956, Wheeler resided in Gideon, Missouri, which is about 200 miles from St. Louis. At that time he was the proprietor of a pool room (3-6). His income from this venture during 1950 through 1955 averaged approximately $5,900 per year.[35]

First Midas Franchise

A Midas advertisement caught his attention in the summer of 1956, and Wheeler wrote defendants concerning the possibility of obtaining a Midas franchise (7-8). In August 1956 a representative of defendants visited Wheeler in Gideon, and Wheeler indicated an interest in a Midas Muffler Shop in St. Louis or Springfield, Missouri (8-10). The Midas merchandising methods were explained to Wheeler, including information as to the guarantee, an initial cost of $5,000, physical and rent requirements for a shop, the national advertising program and the Midas dealer's 2% advertising surcharge (8-12). Wheeler was certain that the franchise agreement was discussed at this time (11, 16-17). At the conclusion of this meeting Wheeler was given some material explaining the Midas concept and was invited to visit defendants' offices in Chicago (8, 11).

About a week later Wheeler came to Chicago (12-14). He had no prior experience with exhaust systems and "wasn't too familiar with any type of a muffler" (7, 14), so he visited a Midas Shop in Hammond, Indiana, to observe, for the first time, the actual operation of a muffler installation shop (14-15). By the time Wheeler concluded

[35] Wheeler's Answer to Interrogatory XV attached Wheeler's federal tax returns for 1950 through 1953 and they state such income, respectively, as $3,330, $5,636, $5,615 and $6,250. DX 148 and DX 149, tax returns for 1954 and 1955 show, respectively, income of $8,189 and $6,684. (R. 534-75)

his Chicago trip he had decided to go into the Midas program, and an appointment was made to have defendants assist in looking for a location in St. Louis (17-19).

A location was promptly selected (20), and Wheeler's first Midas franchise agreement, which he read before signing, was dated September 6, 1956 (28-29, DX 39). Shortly after he executed the franchise agreement, Wheeler made a second visit to the Midas Shop in Hammond, Indiana, and spent several days closely observing the operation "to learn to run a muffler shop" (30). In less than two months since his first exposure to Midas or to a muffler, his Midas Muffler Shop in St. Louis opened for business on September 29, 1956 (29).

Expansion in Midas

Although this first shop incurred a loss for 1956, having been open for only three months, Wheeler in early 1957 was "getting to learn the business" and "wanted to expand" since he did not want another Midas dealer to come into the market (67-68). Assisted by a Midas field counselor, a second location was decided upon, and by March 1957 Wheeler opened a second Midas Shop in St. Louis (68, 77).

With the second shop open and the first shop showing "substantial volume," Wheeler saw prospect of a third shop to be located in East St. Louis (85). A location search was undertaken by Wheeler and a Midas field counselor, and by July 1957 a suitable building was found (86). The franchise agreement for this Midas Shop was signed on July 12, 1957 (DX 41 and DX 42), and the third shop was opened in September (107), still less than a year since Wheeler opened his first shop.

One of Wheeler's St. Louis shops did not progress as he anticipated, and in late 1958 or early 1959 he decided that it should be moved to a different location (119-20).

The Midas field counselor suggested that a new shop be built (120), but Wheeler found an existing building in a location agreeable to defendants (124). During this period Wheeler was advised that another Midas dealer was going to be brought into the St. Louis area (134). Even though Wheeler objected to the prospect of potential competition, he proceeded to open the new shop in June 1959 (128, 134).[36]

Advertising and National Participation in Midas

Wheeler's shops were identified by the "Midas Muffler Shop" sign, and he also had Midas literature displayed inside (38, 94-95). Midas' national advertising through magazines, radio, and television entered Wheeler's area (222). He supplemented this with local advertising, which emphasized "Midas" and the nationwide chain of shops.[37]

Although his own market area was limited to St. Louis County and East St. Louis,[38] Wheeler became nationally involved in the Midas program, and near the end of 1957 he became a member of the National Advisory Council and served for a year (108). At a meeting of dealers, he spoke on the question of advertising (82).

Solicitation by Competitors and Abandonment of Midas

During the summer of 1958, a Maremont representative first explained the Robin Hood program to Wheeler, at which time Wheeler's reaction was that he "didn't care to go into it right at that time," but that he "would keep in

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[36] Wheeler said that he refused to sign a Midas franchise agreement for this new location because it gave him *too small a territory* and restricted purchases of related products (128).

[37] Wheeler's Answer to Interrogatory IV attaches example of the Midas scripts and mats which he used. (R. 803 - 24)

[38] Wheeler's Answer to Interrogatory V. (R. 825)

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contact" (155). In late 1958 or early 1959 Wheeler was again contacted by the original Robin Hood solicitor, who was then accompanied by Herskee (156). At a third solicitation, before Wheeler opened his third Midas Shop, he discussed with Herskee the critical issue, namely, that he "wanted to see what Midas was going to do with this new franchise" and whether Midas was going to bring in a new dealer (157). The proposed franchise from Robin Hood was for an exclusive right to the entire St. Louis and East St. Louis area (213-14). Another Robin Hood solicitation occurred after Wheeler's new Midas Shop opened, at which time Wheeler accepted an invitation to visit the Maremont factory in Chicago since he was thinking of changing from Midas (158). Shortly thereafter, on September 4, 1959, Wheeler advised Midas that his franchise agreements were terminated effective November 9, 1959 (DX 45). On September 24, Wheeler's new Robin Hood franchise was executed (DX 147).

Wheeler's Ultimatum Re His Midas Expansion

Upon defendants' receipt of the termination notice, Wheeler was immediately contacted by Midas' field counselors, but they were unsuccessful in attempting to persuade him to stay in the Midas program (140-41). A few days later Gordon Sherman came to St. Louis to confer, at which time Wheeler said that he was leaving the program because Midas was "bringing someone else into my territory" (178-79).[39] Wheeler told Sherman he would "stay in the program" if he received a 100% guarantee on returns (179). He also insisted that he be given "an

[39] Wheeler asserted that he first inquired as to an exclusive Midas franchise for St. Louis on his first trip to Chicago and was then advised that expansion depended "on how the shop operation went" (16).

exclusive franchise," and would even be willing to purchase the objectionable prospective Midas Shop in St. Louis from its owners (179).[40] Gordon Sherman would not agree to this ultimatum (179), and there was no further discussion between the parties (181). Wheeler sent "all of the Midas merchandise back to the factory for credit" (181).

Post-Midas Experience

As a Robin Hood dealer, Wheeler added selected "allied automobile products" in all three shops (184-85, 210-11) and purchased exhaust system parts from several manufacturers (153-54). Similar to Ross and Skarupa, he issued a personal guarantee on the Robin Hood muffler (171-72). Although Wheeler's Robin Hood franchise encompassed the large geographic area he sought from defendants,[41] he closed one of his St. Louis shops in January 1961 (137-38), and he did not open any additional shops (214).

Like the other plaintiffs, Wheeler's post—Midas experience was remarkably unsuccessful when compared to his financial success with Midas. In 1960, Wheeler incorporated his two Robin Hood shops in St. Louis, and by the end of that year these corporations had a net operating loss of $13,320 (DX 143), with the East St. Louis shop having a

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[40] Wheeler acknowledged that other Midas dealers did not then compete with him (S 238).

[41] As described in Wheeler's Robin Hood franchise agreement, the area included somewhat more than the eastern one-third of Missouri, with St. Louis on the east and Columbia and Jefferson City on the west, and the southwest portion of Illinois, from Alton to Cairo, including all of the area around East St. Louis, and with the addition of Quincy, on the Illinois-Missouri border (DX 147).

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net profit of $6,051 (DX 145). In 1961, Wheeler again operated at a loss, the St. Louis corporate operations losing $8,016 (DX 144), and the profit from the East St. Louis proprietorship being reduced to $2,789 (DX 146). By the end of 1961, Wheeler had closed one of his shops (137), and he was in the same financial position as he had been in the early 1950s when he operated the pool hall.

Midas Profits

Wheeler had operated under the Midas franchise and the Midas merchandise methods during part of 1956, all of 1957 and 1958, and substantially all of 1959. His personal investment in these three Midas Shops was estimated at $30,000 (121, 263). In 1957, Wheeler's participation in the Midas program brought him a personal income of $29,920 (DX 133, 134, 135 and 151), even though two of his shops had been opened during that year. For 1958 his income had risen to $34,562 (DX 136, 137, 138 and 152), even though the East St. Louis shop had been closed by a labor strike for a month during that year (97). For 1959 there are no financial statements that reflect the Midas portion of the year, that is, through November 9 (S. 95); however, the entire year, including the expenses attributed to the change-over from Midas to Robin Hood, brought a profit of $34,034 (DX 139, 140, 141, 142 and 153).

To the almost $100,000 in personal profits during his three years with Midas, Wheeler now seeks to add $439,544.06.[42]

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[42] The damages claimed in Wheeler's Answer to Interrogatory II. (R. 792-801)

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Conspiracy Allegations

As with all of the plaintiffs, Wheeler produced every document he had relating to the alleged conspiracy (55). None of these documents support his claim.

Respectfully submitted,

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Dated: October 18, 1965

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EXHIBIT A TO DEFENDANTS' REPLY BRIEF TO PLAINTIFFS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

United States Patent Office

620,322
Registered Jan. 31, 1956

PRINCIPAL REGISTER
Trademark

Ser. No. 683,396, filed Mar. 14, 1955

MIDAS

International Parts Corp.
(Illinois corporation)
1021 S. State St.
Chicago, Ill.

For: MUFFLERS FOR INTERNAL COMBUSTION ENGINES AND PARTS THEREOF—NAMELY, TAIL PIPES, EXHAUST PIPES, AND MUFFLER CLAMPS —in CLASS 23.

First used Mar. 9, 1955; in commerce Mar. 9, 1955.

1340

EXHIBIT B TO DEFENDANTS' REPLY BRIEF TO PLAINTIFFS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

United States Patent Office

655,853
Registered Dec. 3, 1957

PRINCIPAL REGISTER
Service Mark

Ser. No. 8,010, filed May 9, 1956

MIDAS

Midas, Inc. (Illinois corporation)
1021 S. State St.
Chicago, Ill.

FOR: INSPECTION OF AUTOMOTIVE EXHAUST SYSTEMS AND INSTALLATION OF AUTOMOTIVE MUFFLERS AND EXHAUST SYSTEM PARTS, in CLASS 103.

First use Nov. 15, 1955; in commerce Nov. 15, 1955.

Owner of Reg. No. 620,322.

1401 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 60 C 1636) * *

(Filed February 25, 1966)

MEMORANDUM OPINION

Motion of defendants for summary judgment.

This is a three-count antitrust action arising under Section 1 of the Sherman Anti-Trust Act (Sec. 1, Title 15, U. S. C.), Section 3 of the Clayton Act (Sec. 14, Title 15, U. S. C.) and Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Sec. 13, Title 15, U. S. C.) In essence, the complainants charge in Counts I and II that the terms of certain franchise agreements executed by the parties herein to govern their relationship in the purchase and sale of automotive exhaust systems parts through establishments displaying defendants' trade and service marks, ("Midas" and
1402 "Midas Muffler Shop") illegally restricted plaintiffs in the operation of said shops. It is thus alleged that the corporate and individual defendants herein joined in an illegal conspiracy to restrain trade in violation of Section 1 of the Sherman Act, and have further violated the terms of Section 3 of the Clayton Act. Finally, in Count III, it is asserted that defendants violated Section 2 of the Clayton Act as amended by the Robinson-Patman Act, by granting discriminations in price and service to certain of their customers without offering or otherwise making available these same prices and services to plaintiffs herein.

Defendants have moved for summary judgment on all counts. Plaintiffs have opposed said requests, and in addition, have moved to strike portions of that motion.

In accordance with our earlier decisions in *Rayco Mfg. Co.* v. *Dunn,* (D. C. Ill., 1964), 234 F. Supp. 593, and *Crest Auto Supplies* v. *Ero Mfg. Co.,* (D. C. Ill., 1965), 246 F. Supp. 224, we must grant summary judgment in favor of defendants on Counts I and II. We have consistently held that a litigant cannot be heard to com-
1403 plain of injuries which resulted from alleged antitrust violations to which it was a *voluntary* party. We find no cause to alter that principle today.

It is clear from the undisputed facts before us that each plaintiff voluntarily entered into the franchise agreement at issue and accepted the benefits therefrom. They are, under the holdings in *Rayco* and *Crest, in pari delicto* with defendants, and therefore unable to reap the harvest of their own misdeeds. Each plaintiff recognized that the franchise conveyed to him the right to use the various Midas trade names, trademarks and service marks, and each profited from the use of same. They are not now entitled to the high profit of a treble damage suit when they voluntarily acceded to, fostered, and profited from the very practice about which they now complain.

While defendants may well be liable to third parties for antitrust violations, plaintiffs, having participated in the alleged illegal undertaking, may not recover. See *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.,* (7th Cir., 1943) 138 F. 2d 967, 971; *Pa. Water & Power*
1404 *Co.* v. *Consolidated Gas, Elec., Light & Power Co.,* (4th Cir., 1953), 209 F. 2d. 131, *cert. den.* 347 U. S. 960; *Kershaw* v. *Kershaw Mfg. Co.,* (D. C. Ala., 1962) 209 F. Supp. 447, 454, *affd.* (5th Cir., 1964) 327 F. 2d 1002.

Plaintiffs' cases in rebuttal may all be distinguished. In *Ring* v. *Spina,* (2d Cir., 1945) 148 F. 2d 647, *Mande-*

ville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U. S. 219 (1961); *Bales* v. *K. C. Star*, (8th Cir., 1964) 336 F. 2d 439; *Emich Motors Corp., et al.* v. *General Motors Corp.*, 340 U. S. 558 (1951); *Lessig* v. *Tidewater Oil Co.*, (9th Cir., 1964) 327 F. 2d 459, *cert. den.* 377 U. S. 993 (1965); and *Osborn* v. *Sinclair Refinishing Co.*, (4th Cir., 1960) 286 F. 2d 832, the plaintiffs all entered into agreements as "a result of coercion," "in a context of coercion," or because of "coercive conduct on the part of respondents."

In *Rayco, Crest*, and, *a fortiori*, in the instant case, there has been no showing whatsoever of coercion, economic or otherwise. The depositions of the individual plaintiffs, quoted from in defendants' brief, and uncontraverted except by counsel's arguments, reveal that
1405 each plaintiff signed franchise agreements freely and voluntarily "as a way of making some real money," (Ross, Dep. pp. 238-240); "So I could reap the benefits of such development," (Skarupa Dep. p. 30); "so as not to invite competition," (Pierce, Defendants' App. 19); because "I was looking for something to get into . . . I answered the ad," (Wheeler Dep. p. 7). It is further undisputed from the record before us that each plaintiff sought to expand his market area after initially gaining a franchise, sought to obtain additional franchises thereafter, and sought to create a monopoly for themselves and defendants within specified territorial limits. Further, each plaintiff retained ownership or control of the premises at which his muffler shop was located, paid no franchise fee to defendants, and was able to terminate the agreement unilaterally on thirty days' notice. Under no circumstances could "coercion" be said to have been a factor herein.

The remainder of plaintiffs' cases were distinguished previously in our earlier opinions on the ground that the

only defense relied on therein was "unclean hands."
1406 That is, in the cited cases the mere fact that a plaintiff had himself violated the antitrust laws, independently of defendant, did not suffice to bar maintenance of the suits. However, when that violation is *in conjunction* with defendant, as here, plaintiff is a party to the illegal arrangement complained of, is *in pari delicto* with defendant, and may not invoke the aid of the law. See *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U. S. 211, (1951); *Moore* v. *Mead Service Co.,* 340 U. S. 941 (1951); *Trebuhs Realty Co.* v. *News Syndicate Co.,* (D. C. N. Y., 1952) 107 F. Supp. 595.

We have repeatedly held that a person who freely assents to an act suffers "no legal injury" if harm results therefrom. We are thus satisfied on the papers presented to us that no genuine factual controversy exists, and that defendant is entitled to summary judgment as a matter of law on Counts I and II.

While we need not base our decision thereon in view of the foregoing discussion, we further hold from the undisputed facts before us (contested inadequately under Rule 56 by Counsel's briefed arguments alone) that
1407 the corporate and individual defendants were a single business entity through which a family business was operated, and that, therefore, as a matter of law, no conspiracy existed among them in violation of Section 1 of the Sherman Act.

It is clear from the Complaint that each individual defendant is alleged to be "an officer and/or employee and/or agent of one or more of the corporate defendants (Para. 10, Amended Cmplaint), and that each corporation is alleged to be a "wholly-owned subsidiary" of International Parts (Para. 11). It is equally clear that the

acts of a corporation's agents are in law the acts of the corporation, that a corporation cannot act except through its agents, and that a corporation cannot conspire with itself. Accordingly, each individual defendant when acting as a corporate agent in his normal employment capacity, could not be involved in a conspiracy with the other individual defendants or the corporation itself. *Nelson Radio & Supply Co.* v. *Motorola* (5th Cir., 1952) 200 F. 2d 911, 914:

> "Surely discussions among those engaged in the management, direction, and control of a corporation
> 1408 . . . do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act."

There is no indication that the acts of the individual defendants herein were otherwise. Further it is apparent that the multiple corporations before us constituted in fact a single corporation. While we agree with plaintiff that subsidiary corporations may under certain circumstances "conspire" to violate the antitrust laws, the record before us indicates by uncontested facts that no such conspiracy was present here.

The affidavits of Nathan Sherman and Gordon Sherman, chief executives of the defendant corporations, reveal that the manufacture and sale of exhaust system parts at issue, while operated through a multi-corporate structure, was a single business entity. That is, International Parts sold all the products involved herein. Midas, Inc., acted as a corporate shell owning all trade names, trademarks, service marks and franchise agreements. Muffler Corp. of America handled manufacturing for its parent, and Powell Muffler Co., served
1409 as a distributing subsidiary.

There is no evidence, except in plaintiffs' unsupported arguments that these corporations competed with

each other or acted in any manner other than as a single integrated busiiness. There are no acts alleged which could not have been done by a single corporation acting alone. Plaintiffs may not by mere pleading allegations and conclusions fragmentize a unified business to meet the conspiracy requirements of the Sherman Act.

Inasmuch as plaintiffs have failed to counter the joint affidavit of Nathan and Gordon Sherman, or the depositions of the plaintiffs indicating that they have no knowledge of facts to support the conspiracy allegations of the Complaint, we must grant summary judgment as to the Sherman Act allegations on this ground as well.

Defendants finally assert that summary judgment should be granted on Counts I and II because the franchise agreement and the merchandising methods employed by defendant in connection therewith were reasonable and legal means to protect the Midas trade names, trade-
1410 marks and service marks licensed to plaintiffs, and on Count III because there were no discriminations in price or service between plaintiffs and other purchasers in the absence of requisite competition between purchasers, and the requisite identity of commodities of like grade and quality.

Plaintiffs have moved to strike these arguments on the grounds that defendants have refused discovery as to the factual data underlying the trade and service marks which they now seek to use in support of their summary judgment motion. More specifically, it is alleged that defendants, having objected to answering plaintiffs' Interrogatory No. 34, dealing with certain trademarks owned by defendant, and having prevailed on the Court to sustain said objection on the ground that trademarks were not relevant to this action, cannot now rely on a trademark defense in their motion for summary judgment.

We must sustain plaintiffs' motion. While the significance of defendants' trademarks relating to automotive exhaust systems was most speculative on December 18, 1964, when this Court sustained defendants' objec-
1411 tions, it is apparent now that plaintiffs are entitled to discovery thereon. Summary judgment is a strong remedy, to be applied with great restraint only upon a clear showing that no material facts are in genuine controversy. Where a party has been denied discovery in what later appears to be a critical area, especially on defendants' representation that said area is irrelevant, it cannot be said that the facts have been sufficiently developed to merit summary judgment consideration.

We shall therefore deny summary judgment on Count III of the Complaint at this juncture, without prejudice, require defendants to answer Interrogatory 34(a), (b) and (c) dealing with automotive exhaust parts, within ten days, and permit defendants, if they so desire, to refile the instant motion thereafter. It must be noted, however, that the foregoing does not in any way affect the judgment we have this day ordered in favor of defendants on Counts I and II.

ENTER:

Abraham L. Marovitz,
Judge.

Dated: February 25, 1966.

1414 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 60 C 1636) * * *

ORDER

This Cause coming on to be heard on the defendants' motion for summary judgment filed herein on October 18, 1965, and plaintiffs' motion to strike portions of the said defendants' motion filed herein on January 5, 1966, briefs having been submitted by the parties; the Court having filed its Memorandum Opinion on February 25, 1966; and the Court being fully advised in the premises it is hereby Ordered, Adjudged and Decreed as follows:

1. Defendants' motion for summary judgment with respect to Counts One and Two of the Amended Complaint be and it is hereby sustained and said Counts One and Two are hereby dismissed with prejudice.

2. Defendants' motion for summary judgment as to Count Three of the Amended Complaint is hereby denied and without prejudice and said motion may be refiled at any time after defendants comply with the
1415 following subparagraph.

3. Defendants, on or prior to March 10, 1966, shall file with the Court and serve on counsel for plaintiffs Answers to Plaintiffs' Interrogatory 34(a), (b), and (e), which interrogatory was filed herein on October 22, 1961.

ENTER

Abraham L. Marovitz
Judge

Satisfactory as to form:

....

Attorney for Plaintiffs

Glenn W. McGee

Attorney for Defendants

March 2, 1966

1494 In the District Court of the United States

* * (Caption—No. 60 C 1636) * *

(Filed May 20, 1966)

MEMORANDUM OPINION

Defendants' Motion for Summary Judgment on Count III.

This is a three-count action arising under the anti-trust laws of the United States. In essence, the complainants charge in Counts I and II that the terms of certain franchise agreements executed by the parties herein to govern their relationship in the purchase and sale of automotive exhaust system parts through establishments displaying defendants' trade and service marks ("Midas" and "Midas Muffler Shop"), illegally restricted plaintiffs in the operation of said shops. It is thus alleged that the corporate and individual defendants herein joined in an illegal conspiracy to restrain trade in violation of Section 1 of the Sherman Act, and have further violated the terms of Section 3 of the Clayton Act. In Count III, it is asserted that defendants violated Section 2 of the Clayton
1495 Act, as amended by the Robinson-Patman Act, by granting discriminations in price and service to certain of their customers without offering or otherwise making available those same prices and services to plaintiffs herein.

On February 25, 1966, this Court granted defendants' motion for summary judgment on Counts I and II, holding that, in the absence of coercion, plaintiffs were *in pari delicto* with defendants, and, thus, unable to maintain the instant action. At the same time we postponed ruling with regard to Count III on plaintiffs' assertion

that interrogatories calling for information relevant to the issues raised therein were objected to by defendants and not answered. The defendants having now supplied the requested information, we may proceed to consideration of defendants' motion.

In support of its motion for summary judgment on Count III, defendants assert that any alleged difference in price or service between purchases by plaintiff of Midas brand exhaust parts and purchases by other persons of Midas or International brand parts from defendant did not constitute a discrimination violative of the Robinson-Patman Act, in that (a) plaintiffs did not compete with oher purchasers of Midas brand parts; (b) plaintiffs had the opportunity to purchase either brand; and (c) the Midas exhaust parts system was unlike the International system in grade and quality.

1496

Taking the alleged *intra*-brand discrimination first, i.e. sale of Midas parts to Midas dealers at prices lower than those charged plaintiff for Midas parts, it is clear, under Section 2(a) of the Robinson-Patman Act (Sec. 13, Title 15, U. S. C.) that said statutory provisions apply only where the alleged discrimination is between *competitors. Bales* v. *K. C. Star Co.,* (8th Cir., 1964) 336 F. 2d 439; *National Lead Co.* v. *F. T. C.,* (7th Cir., 1955) 227 F. 2d 825, 836; *Borden Co.* v. *F. T. C.,* (7th Cir., 1964) 339 F. 2d 953, 956. Indeed, the late Judge Julius Miner of this Court, on October 16, 1961, ordered plaintiffs herein to amend their complaint so as to properly allege competition with the favored purchasers. Without such allegations, Judge Miner concluded, the complaint was legally insufficient.

Having reviewed the depositions, affidavits, and documents submitted herein, we must hold that no real controversy exists as to the factual elements of this issue,

and that defendants are entitled to summary judgment thereon as a matter of law. That is, each plaintiff has admitted that the geographic "marketing area" in which he sold his Midas products was the "city or county" in which each shop was located, and that no other Midas dealers were located within that region of competi-
1497 tion. (Skarupa, Int. V; Skarupa Dep. pp. 187-88, 302-03; Ross Int. V; Ross Dep. pp. 278-79; Pierce, Int. V; Pierce Dep. p. 334; Wheeler, Int. V; Wheeler Supp. Dep., p. 238; Ross Dep. pp. 402-03.) Thus, it is clear from plaintiffs' own testimony that none of the alleged favored purchasers of Midas brand products operated in or near the marketing area controlled by plaintiffs' shops, and that none of said purchasers were ever in competition with plaintiffs.

Plaintiffs have apparently elected not to contest these facts by affidavit or deposition testimony. Rather they seek to defeat defendant's motion for summary judgment by asserting that competition existed between International Parts dealers and plaintiffs, and, that, indeed, there was no difference in grade or quality between the International muffler and the Midas muffler. While this argument is relevant with regard to the second portion of defendants' motion which concerns "*inter*-brand" discrimination i. e. sale of International brand systems to purchasers at prices more favorable than those extended to plaintiffs in their purchase of Midas products, to be discussed *infra,* it does not contradict defendants' initial contention in any way. That is, defendants have demonstrated that no material fact remains in controversy with regard to intra-brand discrimination between Midas dealers, and that judgment on that issue should be
1498 entered in their favor as a matter of law. Accordingly, summary judgment is granted on Paragraphs 24, 24A and 25 of the Amended Complaint, which para-

graphs deal exclusively with the discriminatory sale of Midas parts alone.

We must then turn to Paragraphs 26 through 31 of the Amended Complaint, in which are alleged facts supporting the remainder of Count III. In said paragraphs, plaintiffs contend that price and service discriminations existed between plaintiffs and purchasers of International products. In defense thereto, and in support of their motion for summary judgment, defendants contend that both Midas and International Brand Products were freely available to plaintiffs at the prices offered others, and that a price differential between the two products was justified by an existing dissimilarity in grade and quality. These two assertions, if proven, would constitute a complete defense to the Section 2(a) allegations at issue.

As the Court of Appeals for the Ninth Circuit stated in *Tri-Valley Packing Assn.* v. *F. T. C.,* (9th Cir., (1964) 329 F. 2d 694, at pp. 703-04, "if the lower price would have been available to the nonfavored buyer . . . the probability of competitive injury due to the fact that the nonfavored buyer paid more . . . is not the result of price discrimination, but of the nonfavored buyer's
1499 failure to take advantage of the opportunity, equally available to him, of buying at the same low prices."

Thus, assuming for the purpose of argument that the International Brand parts were identical to the Midas parts, there could be no discrimination within the meaning of Section 2(a), if plaintiffs were able to purchase the former at the lower price, but elected to pay higher prices for the latter. See also *United Banana Co.* v. *United Fruit Co.,* 1965 Trade Cases Par. 71,522 (D. C. Conn.).

The uncontroverted deposition testimony of plaintiffs clearly demonstrates that prior to the introduction of

the Midas prgram, plaintiffs Ross (Dep. pp. 7, 8, 10, 14, 21, 24, 229-230), Skarupa (Dep. pp. 29, 293) and Pierce (Dep. pp. 11-14, 19, 22) purchased International parts from defendants, and that, indeed, one of them, Pierce, continued to sell such parts from his retail stores during his operation of Midas shops (Dep. p. 47).

While plaintiffs' counsel baldly asserts that plaintiffs could only buy Midas products, it is clear that on a motion for summary judgment, such unsupported contentions cannot effectively refute the sworn deposition testimony of plaintiffs themselves. As our discussion with regard to the coercion issue present in Counts I and II demonstrated, the evidence is clear and uncontrovert-
1500 ed that plaintiffs herein freely elected to sell Midas parts. Whether they were influenced by the guarantee thereon, the "free installation" approach, or the national advertising program is not crucial. What is important, however, is that plaintiffs, well aware of any price differentials that might exist between the two brands, having dealt with International previously, and in one instance having continued to do so, *freely* chose to forego purchases of International parts and to deal exclusively with Midas. They cannot now, with the wisdom of hindsight, declare that they would have done better with International Parts purchases. The evidence is uncontroverted in demonstrating that plaintiffs were free to purchase either product, but chose Midas. No discrimination in a legal sense is present, and defendants are entitled to summary judgment.

Finally, we are convinced that the Midas parts were sufficiently dissimilar in grade and quality from International products so as to justify a price differential under the terms of Section 2(a).

While we are fully aware of the recent holding of the United States Supreme Court in ***Borden Co.* v. *F. T. C.*,**

(dec. March 23, 1966) 34 U. S. L. Week, reversing the Fifth Circuit Court of Appeals (339 F. 2d 133), and holding that a difference in grade and quality cannot be established "by a label alone or by the label and its
1501 consumer appeal," we are equally satisfied that the facts before us are not that narrow. In addition to an undisputed physical difference existing between the two mufflers after January 1, 1959, the uncontroverted facts clearly reveal that the Midas product included in its purchase price a unique lifetime guarantee by the manufacturer, not attached to the International commodity. (See defendants' Answer to Interrogatory 10 for provisions thereof.) Such a guarantee, in the opinion of this Court, clearly justifies a differential in price, and with equal clarity, constitutes a dissimilarity in grade and quality.

While we could not preclude plaintiffs from discovery they considered crucially relevant before ruling on defendants' Count III motion, we are satisfied now that Midas trademarks and their validity are irrelevant to the issues raised herein.

Accordingly, the location of defendants for summary judgment in their favor on Count III is granted.

ENTER:

Abraham L. Marovitz
Judge

Dated: May 20, 1966

1502 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 60 C 1636) * *

FINAL JUDGMENT OF DISMISSAL

This Cause coming on to be heard on the defendants' motion for summary judgment filed herein on October 18, 1965, and the defendants' renewed motion for summary judgment filed herein on March 11, 1966; the Court having filed its Memorandum Opinion on February 25, 1966, and entered its Order on March 2, 1966 sustaining defendants' motion for summary judgment with respect to Counts One and Two of the amended complaint and dismissing with prejudice said Counts One and Two; briefs having been submitted by the parties; the Court having filed its Memorandum Opinion with respect to said renewed motion on May 20, 1966; and the Court being fully advised in the premises it is hereby Ordered, Adjudged and Decreed as follows:

1503 1. Defendants' renewed motion for summary judgment with respect to Count Three of the amended complaint be and it is hereby sustained and Count Three is hereby dismissed with prejudice.

2. The complaint filed herein, as amended, be and it is hereby dismissed with prejudice.

ENTER

Abraham L. Marovitz
Judge, U. S. District Court

Dated: May 24, 1966.

In the District Court of the United States

* * (Caption—No. 60 C 1636) * *

DEPOSITION OF JOSEPH PIERCE

* * * * *

13 Q. What brands of automotive parts in addition to Firestone did you carry?

A. So many of them, I have to stop and think. You mean each particular item we handled?

Q. Yes, sir.

A. We had Champion sparkplugs, A. C. sparkplugs, Delco batteries, Motorola car radios, Hastings piston rings, Trico wipers, International shock absorbers, International mufflers, Kemtone house paint, DuPont polishes and cleaners, G. E. automobile bulbs, Howard Zink seat covers, Firestone seat covers, Firestone batteries and Firestone tires.

* * * * *

19 Q. Did you have prior experience?

A. Binghamton, New York as Muffler Sales and Service, Division of J. C. Pierce, Inc.

Q. When had you set up that division?

A. 1954.

Q. Was there any particular reason for this action at that time?

A. Yes, sir.

Q. Would you explain it to us?

A. Yes, sir. Previous to 1954, we were installing mufflers and shocks at the locations that we had service facilities at the J. C. Pierce, Inc. stores, and our

20 experience proved that there was a future to the muffler installation business, and I proceeded to look for a location and Binghamton, New York was the first one available in 1954, to install mufflers and shocks and springs.

* * * * *

21 Q. When you started this operation as a division, what brand mufflers were you selling?

A. International.

Q. The same for shocks and springs?

A. International shocks and Vulcan springs.

* * * * *

38 Q. With whom did you first discuss the Midas brand?

A. Charles Lichterman.

Q. Remember when that discussion took place?

A. It was prior to April 1, 1956.

Q. Was it in 1956?

A. Yes, sir, to the best of my recollection, it was.

Q. Do you recall the substance of that discussion?

A. Yes, sir. Mr. Lichterman called on me. We sat in my office and he presented me with this Midas franchise. I told him I wasn't interested in it. Because of my experience with franchises in the past, I told him I was satisfied to operate as an independent operator.

In the meantime, prior to this, Mr. Lichterman and I made a trip to Buffalo, New York to look at other muffler installation shops that were operating. We called on the International shop in Buffalo, New York, Kar-Muffler, and also the Midas Muffler Shop in Buffalo, New York operated by Lou Gristina and a partner; I don't know the man's name.

39 Q. C-r-i-s-t-i-n-a?

A. -a-n-a or i-n-a. To the best of my recollection, these shops were operating prior to Mr. Lichterman presenting me with this franchise.

Subsequently, I inquired of Mr. Lichterman as to why the International Muffler Installation Shop did not take on the Midas franchise.

He told me that they had the opportunity, they were offered the franchise previous to the Midas installation, and they turned it down.

After the Midas installations were installed, Kar-Muffler objected to the competition from the same supplier. The answer to that was that they were offered the Midas franchises previous to these new dealers being franchised. In effect, the same thing could happen to me; if I didn't take on the Midas franchise, that I was open to competition from a Midas Muffler Shop, and that International mufflers were to be sold through other dealers, through dealers other than installation shops.

So as not to invite competition, I signed the franchise. At this time, I want to go on record that I was handling mufflers, shocks and springs, and that there were no objections to me handling these items at the time I signed these franchises. This, in effect, excluded me from handling other name brands of mufflers.

• • • • •

Q. And what was the substance of the conversation, if any, which you had with him about Midas on the way back?

A. Well, I was curious to know why Kar-Muffler, having two successful International operations, was subjected to competition from their own supplier, and it was explained to me by Mr. Lichterman that they had the opportunity to take on the Midas franchise, and when they turned it down, they left the territory wide open for Midas Muffler Shops, and the same thing would apply

to me or any other territory where there was an International installation shop.

• • • • •

55 Q. I believe you said there was also a muffler shop operated by you in Mattydale.

A. Mattydale.

Q. Mattydale?

A. Yes, sir.

Q. Apparently there never was a franchise executed in connection with that location?

A. That is right, sir.

• • •

80 Q. I think we have established before, Mr. Pierce, that for the Mattydale location there was no License and Sales Agreement. Was that location operated as a Midas Muffler Shop?

A. It was.

Q. And how did you work that out?

A. Well, I opened the shop in the suburb of Syracuse, a small shop, and the Midas representative and myself worked together on it. Nothing was ever said about a franchise, but at a later date Mr. Gordon Sherman, when on a visit to Syracuse, looked the operation over and he approved of it, verbally.

Q. Did you ever request a franchise for that location?

81 A. No, I did not.

• • •

105 Q. Did Mr. Lichterman indicate to you any of the
106 advantages that he thought you could obtain from the Midas program?

A. Other than the national advertising and the possibility of competition there were no advantages at that time, because we were operating successfully as an independent muffler installation shop.

Q. Did you indicate to him or to anyone else that you were entering into these franchises under protest?

A. Only at the time I discussed it with Mr. Lichterman, earlier or previous to the date we signed these franchises.

Q. After you had been in the program did you ever indicate to anyone representing Midas or International that you had entered into the program under protest?

A. No, sir.

* * *

130 Q. During the time you were with the Midas program, did you request permission to open any other locations?

A. Other than these?

Q. Other than these seven which we have talked about?

A. Yes, in Rochester, New York.

Q. Any place else?

A. Albany, New York. That's about all.

Q. Those two?

A. That's about it, yes.

Q. Do you recall the time and to whom you directed
131 the request as to Rochester?

A. Yes, sir, this was in '56 and the request was directed to Mr. Charles Lichterman.

Q. About what time of the year '56?

A. Oh, I would say approximately the middle of the year.

Q. Was it after you had started with the Midas program?

A. Yes, sir.

Q. What led up to this conversation?

A. Well, at that time, we had three shops: Syracuse, Utica and Binghamton, and I was looking for locations for others, and Mr. Lichterman and I drove to Rochester and also to Albany to look for a location.

Q. Did you find any?

A. We were not successful in Albany, but we looked at a location in Rochester and made a lease offer which was not accepted.

Q. Did that end the search then for—

A. I continued to look for locations through a real estate man.

Q. Did you ever find a location and have your request to open a Midas shop at that location refused by Midas?

A. No, sir. In the meantime, these locations had—prospective dealers were found for these two locations.
132 In fact, John Kiskas came into my shop and I explained the program to him. I told him I was enthused about it and he seemed to like it, so eventually, he became a Midas dealer.

* * *

169 Q. Did you discuss this with Mr. Lichterman at the time you signed the first franchise?

A. I did.

170 Q. What did he say?

A. I told him that this paragraph that restricted me from selling nothing but exhaust muffler parts was just impossible for me to abide with, because I had shocks and springs for sale in my place of business, and I liked it. It was a very profitable part of my business, and I did not intend to discontinue the sale of them, and he said I wouldn't have to.

* * * * *

172 Q. Did you participate in the discussion of the guarantee?

A. No, sir—in the discussion?

Q. Yes, sir.

A. Of the guarantee?

Q. Yes.

A. I don't think we had any opportunity to discuss the guarantee. We were told that the guarantee was changed to a 50-50 basis, period.

Q. Isn't it a fact that at that meeting, Mr. Gordon Sherman announced the policy and then asked the National Advisory Council to discuss it among themselves?

A. Yes.

Q. Didn't you do that?

A. We did but—

Q. What was the substance of that discussion?

A. Well, naturally, the dealers were dissatisfied with the new policy on guarantee, and I discussed with the Advisory Council, I said, "If you fellows feel that way about it, why dont we say something about it, sit down and say somthing about it.'"

When we sat down, we didn't have an opportunity
173 to say anything about it. It was just passed over like that. In other words, that was the new policy,

and Mr. Gordon Sherman made up his mind it was a 50-50 basis and, obviously, it was useless to discuss it.

* * * * *

183 Q. Did you have any further discussion about this guarantee problem following this exchange of correspondence?

A. Verbally with the Midas counselors. I was led to believe, along with other dealers, at the first meeting which was after we signed this contract, that the guarantee was changed to 100 percent. I read this clause before that and I knew what it meant, but at this meeting, there was a change. The dealers were told that it was a 100 percent guarantee.

Q. That was the March '57 meeting?

A. That's right, but the contracts were not changed to that effect.

Q. My question was whether after this exchange of correspondence in February '59, whether you had any
184 further conversations concerning the guarantee problem?

A. If I did, I only discussed it with the field counselor and voiced my opinion the same as I did in this letter.

Q. You continued to purchase Midas merchandise after this exchange of correspondence?

A. I had no choice.

Q. And did you continue to honor the guarantees?

A. I did. I had invested over $150,000. advertising this product. I had no choice as to whether I could discontinue it or keep it.

* * * * *

222 Q. Did you make any changes in any of your locations during that first year after leaving Midas with respect to personnel?

A. Nothing; no, I don't think so.

223 Q. Did you change the physical facilities in any way other than to change the signs and that type of thing?

A. No, with the exception of the new shop that we set up.

• • •

300 Q. At any time has any representative of Powell or International refused an order by you of Powell brand goods?

A. No, sir.

MR. MILLER: Off the record.

(A discussion was had off the record.)

MR. McGEE: Q. One question that I think was asked before which I can't remember the answer, and that is whether J. C. Pierce, Inc. continued to sell International brand products after you became a Midas dealer?

A. We did.

Q. And did they ever cease selling International brand
301 products?

A. No, we still have some; and we purchased, oh, not a great quantity, but up until the present time.

• • •

315 Q. Calling your attention then to Sub-Paragraph (N) on Page 17 which states that plaintiffs were consistently required to purchase the full line of automotive exhaust parts offered by the defendant.

Do you know what the words "full line" mean in that instance?

A. I do.

Q. Would you explain it for us, please?

A. Mufflers, tailpipes, exhaust pipes, clamps, hangers, the Hollywood-type mufflers and related items.

Q. Was there any occasion on which you requested permission to carry a partial line of automotive exhaust parts?

A. Other than second-line mufflers, that is the only occasion I requested handling that.

Q. Well, calling your attention to Sub-Paragraph 316 (O) on Page 17 which says, among other things, that

defendant Midas threatened to terminate the agreements with contractees including plaintiffs in the event they purchased, et cetera, automotive exhaust parts from sources of supply other than Midas, or in the event that they purchased or serviced allied automobile products.

Have you detailed for us each occasion on which you were threatened with termination of your agreement because of these reasons?

A. Well, I was consistently threatened by the field counselors to discontinue the sale of other than exhaust parts.

Q. Did any field conuselor say that your contract would be terminated if you did not cease to carry shocks or springs?

A. Well, I interpret the word "threaten" to mean that they would consistently come in and tell me that I shouldn't handle these exhaust parts, it was against the franchise, and that if I didn't cease selling these items that my contract could be cancelled.

Q. They would actually use those terms, your "contract could be cancelled"?

A. Yes, sure.

317 Q. Did they ever say your contract would be cancelled?

A. I don't remember if that was said or not.

Q. Now was there any occasion when they indicated that your contract could be cancelled unless you cease buying automotive exhaust parts other than Midas, that is, mufflers or pipes?

A. The same thing applied to that, yes.

Q. Could you detail for us briefly the occasions when these conversations took place?

A. I don't remember exactly when these conversations took place, but I know that they did, and from time to time they would tell me that if I continued to sell these items other than exhaust parts that my contract could be cancelled. And eventually, I believe, that it was cancelled for that reason.

Q. Well, my question at this point is directed not to shocks and springs and other products, but to exhaust systems only, such as Nu-Era or Texas Tailpipes, or what have you.

A. Yes.

Q. Would you explain those conversations for us?

A. Well, Mr. Gordon Sherman came into my warehouse at one time and saw a shipment of Texas Tailpipes there and he was very unhappy about it.

318 Q. What did he say?

A. He said to me, he said, "Joe," he said, "You know our franchise is just like a marriage, this is like cheating on your wife, it is grounds for divorce."

319 Q. You indicated that you thought the reason for your cancellation was your continuing to sell shocks and springs?

A. Yes, I do.

Q. Do you know of any other instance other than yours which might be covered by the sentence beginning at the last of Page 17 and continuing over onto Page 18?

A. Yes. I know that at the time they cancelled my franchise that they were putting pressure on the Buffalo shop operators, and they were told that if they did not discontinue the sale of their shocks and springs that their contract would be terminated and they agreed to discontinue them. And this was told me by Bernard
320 Miller, the representative of Midas that was checking my stock out and shipping it back to Chicago. He told me that his next stop was Buffalo and he told me they were taking their shocks and springs out. I said, "You really mean that Bernie?" He said, "Yes, they had agreed to it."

* * * * *

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 60 C 1636) * *

* * * * *

DEPOSITION OF MAXWELL ROSS

44 Q. Would you explain your last remark about the difficulty?

A. Yes, sir. When I signed my franchise, my original franchise in Muskegon, it was signed for the City of Muskegon or the County of Muskegon.

When I signed my franchise for the Grand Rapids location I signed for the Kent County area, not a specific address.

When they gave me the franchise for Minneapolis, they wanted to pin it down to one particular location only, and I wanted the whole area. I wanted not only the Minneapolis but St. Paul. You know they are called the Twin Cities. I was finally persuaded to sign the franchise for the specifc location with tacit expression and tacit permission to open up anywhere in the Minneapolis area that I wished. St. Paul was held out.

* * *

48 Q. What determined you to open the Lake Street location?

A. Well, I had had a good measure of success in the Muskegon and Grand Rapids areas. I liked the program. It was making money for me. I wanted to get into a larger metropolitan area, and Minneapolis was open.

* * *

57 Q. In what way was that more efficient?

A. Well, I have always felt that the repair business, the automobile repair business had perhaps a distasteful

meaning to the public, and in many cases you are dealing with an unknown quantity when you are dealing with a consumer. I wanted to take that uncertainty out of my business if I could, because if I could put that car up on a hoist, I could actually show the customer what he needed.

* * *

69 Q. Did you sell springs and glass during that year?

A. I sold springs.

Q. But no glass?

A. No, I sold no glass.

Q. So during 1956 from Grand Rapids, you sold only mufflers and allied pipes and springs?

A. Springs, I was stopped from selling glass.

Q. Did you start to sell glass?

A. No.

70 Q. You weren't stopped from selling glass?

A. I was told not to.

Q. What about 1957 at Grand Rapids, what products did you sell?

A. I discontinued selling springs or any other allied products, I believe, sometime in July of 1956, and from that point forward sold nothing else but mufflers and pipes.

* * * * *

172 The second shop was very succesful, at least in my estimation, and I began to think what I should do in Grand Rapids, because I was not satisfied with that location in Grand Rapids even though it was doing, even by Midas standards, a pretty good job so far as volume was concerned.

So, I approached Lou Gurnick and told him I wanted to open up a second shop in Grand Rapids. . . .

* * *

174 So I approached Lou Gurnick again. I said, "I will tell you what I will do, Lou. Give me permission to open up a second shop at the north end of Grand Rapids, and I will have it built by January or February of 1959."

* * *

210 Q. Did you ever make any objection to anyone at Midas about following those prices?

A. Most certainly.

Q. Any objections apart from the incident involving Tideys which you mentioned yesterday?

A. Yes, sir.

Q. What was the first such occasion?

A. There again I am not specific so far as dates
211 are concerned, but at various times I spoke with Lou Gurnick and also with Jack Brezin prior to him, that I felt it was unfair for me to compete with international because they had no fixed price policy. They were underselling me on the telephone and over the counter and I had no way of competing with them. In essence the story was correct, when he said this was the same muffler, the same guarantee, made by the company. I had no weapon to fight him with.

* * * * *

238 Q. Referring again to Defendants' Exhibit 9 for identification, what did the agreement mean to you at the time you executed it.

* * *

A. Well, let me say generally this was merely an agreement which give me specific territory to sell merchandise identified as Midas. It was an avenue of outlet for them and an avenue for sales and profit for me.

This in general terms is what I thought about this.

* * *

239 Q. Did he explain to you that the whole idea of Midas was a new concept in automotive exhaust installation?

A. I don't know whether he called it a new concept. This is what I have termed it. It was—I don't know how he generally described it, but to me it was a new concept.

Q. What did it mean to you?

A. It meant that I thought that this was a good idea. I thought that it was a way of making some real money
240 if you got into it quickly.

Q. But what were the business operations involved in this new concept?

A. Generally, the thing that excited me was the guarantee, the advertising program which they were going to generate on a national level, the free installation which was a magical term, at least, so far as the public was concerned, and the 15-minute installation was a convenient thing, and I recognized that always the owner of an automobile is interested in quick service.

Q. Didn't he explain to you that this concept was one involving installation solely?

A. No, sir, there was no restriction made on me on the sale of that muffler originally.

Q. When you say originally, you mean there was later?

A. Yes, definitely later.

241 Q. When was that?

A. I don't recall whether there was a general discussion at the convention that was held in Chicago some-

time in March of 1957 or whether there was specific discussion with myself and Mr. Brezin at a later date about the over-the-counter sale of mufflers, but certainly the specific subject was mentioned several times, if not many.

* * * * *

246 Q. Did you ever call it to his attention that the language of the agreement apparently gave you the right to use your name?

A. If you recall—and I am not saying that this is so—this one was cancelled and I received a new one. I don't know what this new agreement states.

Q. You are referring to Defendants' Exhibit 10 for identification?

A. Yes. This is the first agreement I signed with him. I don't recall what restrictions, if any, there were on the second one; but let me say this, that the threat of cancellation was always held over my head if I didn't comply.

* * * * *

252 Q. Calling your attention to Clause F in Section 2 of Defendants' Exhibit 4 for identification,—

A. This clause apparently is a change from the previous agreement which I signed. Here again, may I state for the record, this agreement was signed two years later, approximately. I am talking about Defendants' Exhibit 4 as against Defendants' Exhibit 10.

Two years from the date of the original agreement I had already spent a considerable sum of money advertising the name "Midas." I had already committed myself to this program for two solid years. I had no choice but to sign the second agreement.

We had one issue, which I discussed in my previous testimony, insofar as location was concerned. I think mostly I was concerned with that. As far as the change in location was concerned, this was to my disadvantage.

Yet I signed. There were other clauses in this con-
253 tract that were against my particular interest as compared to my first agreement. But I signed, not because I wished to sign it, but because I really had no other choice.

Q. Would you explain that a little more? I am not certain that I understand why you thought you had no choice?

A. There were two avenues open to me. One was to say I am not going to sign this agreement, in which case my franchise would have been revoked and I would have had no franchise; or continue in its operation with the changes as set forth in Defendants' Exhibit 4.

These were clauses certainly taking away the benefit or certain benefits that I had contained in Defendants' Exhibit 10.

So I came back to my original premises. I had a choice of doing either one of two things, either divorce myself from the Midas program at that time or the Midas muffler at that time, or continue. Since I had committed myself to two years of operation at considerable expense, I felt that this was what I had to do, or I would have lost.

* * * * *

256 Q. During the time that you were in the Midas program, did any representative of Midas ever call your attention to any specific provisions of the contracts under which you were operating?

A. In my discussions with Mr. Brezin and Mr. Gurnick covering restrictions on sale of other merchandise, I believe this clause in the contract was referred to.

Q. That would be the clause with respect to other merchandise, is that correct?

A. Dealing with the exclusive part of the contract.

Q. That would be Clause C of Paragraph 2 of Defendants' Exhibit 4 for identification, and the same clause in Paragraph 2 of Defendants' Exhibit 10 for identification, is that correct?

A. That one, and also the exclusiveness of buying everything from Midas, also. These were two pertinent aggravating situations that I discussed with my field counselors and certainly with Mr. Brezin.

Q. Do you recall the substance of any such conversation?

A. I remember discussing it specifically initially in the program with Mr. Brezin, because this was a gentleman that came back to me later on,—I would say some-
257 time in July or perhaps August of 1957—and said, "I am embarrassed." He said, "You have to get rid of your springs in Muskegon and Grand Rapids."

I said, "Why?"

"Against company policy," he said.

I said, "But, Jack, you sold me those springs. What happened?"

He said, "Gordon told me that you are a model operator in the program. You are an example that had been set up as something to look up to. How could we tell the other people in the Midas program that you are selling springs and tell them that they can't sell springs?"

I said, "You mean to tell me I have to get rid of those springs?"

He said, "That is the it has got to be."

And I sold those springs at a considerable loss.

* * * * *

258 Q. No, any of them, if there were any such conversations.

A. I had many discussions not only with Mr. Brezin and Mr. Gurnick, but also with Gordon Sherman and with Nate Sherman but probably not together, because I doubt that Mr. Gordon Sherman and Mr. Nate Sherman ever cound be found together.

I had conversations with both of the gentlemen on the two restrictive clauses. One was the restriction as
259 to being able to sell only mufflers and pipes, because I told Gordon Sherman particularly, either during the March 1957 convention or shortly thereafter, that I felt the competition would set in, that we as Midas operaors did not have a broad enough base to warrant sufficient volume.

I felt that the Midas operators should be allowed to broaden their base of operations to include shocks and springs, anything of a general nature that wouldn't interfere with their concept of what this operation should be, anything underneath that car, because I felt as a retailer that if I could bring traffic into my shop and if I could put that car up on the hoist and have a customer look at it, there are many things underneath that car I could sell.

I was restricted and the answer was "no."

I was also familiar with the fact that I could buy other merchandise, specifically, without trade name. I didn't want to try to buy other mufflers, but I did want to buy other pipes. There were available to me, through conversations with other boys in the program who were buying these pipes at considerably less money.

The answer was "no." I asked them why. I said,
260 "There is no trademark on that pipe. There is no insignia on the pipe. The customer would never know whose pipe it was, who manufactured it. What difference did it make to Midas whether I sold a Midas pipe

or an International pipe or a Texas pipe, or a Joe Schmoe pipe?

The answer was "No, all Midas; your agreement says so."

Q. Did both Gordon and Nate Sherman say, "Your agreement says so, all Midas?

A. All Midas, both of them.

* * * * *

265 Q. Would you detail those threats and the subject matter that brought them about?

A. Specifically, here was an instance in which my Grand Rapids manager sold merchandise, or I should say mufflers, over the counter to a wholesale outlet, I believe, at Lake City, Michigan.

Q. Lake View?

A. Lake View, that is right. I tried to stop it and eventually I did stop it, with the expressed threat
266 of cancellation.

Q. Who expressed that?

A. Mr. Gurnick.

Now, in the other area, so far as restricted merchandise was concerned, in the area of selling over the counter, implications were made to me that I must comply with my contract.

Q. By Mr. Gurnick?

A. By Mr. Gurnick, and when I said to him, "Suppose I don't?" the answer was never "I will cancel your contract." The answer was evasive. It was always, "Well, what do you think is going to happen," "So, what is going to happen", "you know what can happen. It has happened in other shops. You saw the situation in Sarasota, Florida."

There was no other inference that I could take. It was either a matter of complying with specific requests or specific clauses contained in these Exhibits 4 and 10, or else running the risk of cancellation; and I saw where cancellation had been made specifically.

* * * * *

284 Q. You mentioned the National Advisory Council. Would you describe that for us?

A. I will try. I was first advised about the National Advisory Council at the first convention which was held in Chicago in March of 1957.

I was appointed to that council by Mr. Gordon Sherman. As represented to, this particular group of ten people who were chosen to serve on that National Advisory Council represented, in Mr. Gordon Sherman's opinion the ten foremost Midas dealers in their program as of that date.

As I understand it, the function of this National Advisory Council was to meet upon suggestions from headquarters in Chicago at their expense to discuss all phases of the operation. It was a discussion of ideas, an exchange of ideas, covering all phases of the operation, whether it was installation techniques or advertising methods and ideas of selling techniques, anything of a general nature that would promote and help the program for the benefit
285 of everybody in the program.

By "program" I mean—call it an organization; call it a society; call it an affiliation. I don't know what you care to call it. It was a group of people with a common purpose in mind.

* * *

288 Q: What you considered actually—my question was: Define what you considered your function to be as a member.

A. Let me put it very briefly. Every one of us who was a Midas dealer was in this program—and I want to put quotation marks around the word "program"—in this thing, for one paramount reason; and that was to make the most money he possibly could.

This is the prime reason for anybody going in business, either in business or the professions. I am sure that is your prime purpose, to make as much money as you possibly can. Our purpose was to formulate ideas and patterns of operation to produce the optimum of profit for each Midas operator.

* * *

399 Q. Were those products similar or identical to the products offered by Midas?

A. What do you mean by "similar" or "identical", sir?

Q. That is the word used in your Complaint, so I believe I will have to ask you to answer it as best you can?

A. As to mufflers, they were different insofar as physical appearance was concerned. As to tail pipes and exhaust pipes, to me there was no difference.

* * *

409 Q. During the time you were in the Midas program, did you ever request permission to purchase International brand automotive exhaust parts?

A. That would be rather silly. It was the same merchandise I was buying from Midas. What would be my purpose?

The answer to that would be "no."

* * *

421 Q. It is a fact or is not a fact that you were damaged by action of the defendants in not allowing you to sell shocks, brakes, glass and springs?

A. Yes, sir, it is a fact.

* * * * *

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 60 C 1636) * *

* * * * *

DEPOSITION OF GREGORY T. SKARUPA

14 Q. What led to your decision to open a business in October of 1955?

A. I was invited to Cincinnati, Ohio to see a muffler shop operated by a brother-in-law. This muffler shop carried automotive exhaust parts that were purchased from International Parts, and shock absorbers, and springs, and the operation looked as though it might be a profitable one for me to invest in. I liked the idea of being able to service the public with under-the-car items.

* * *

15 Q. Following your visit to Cincinnati and your awakened interest in this business, what if anything did you do?

A. Prior to our leaving Cincinnati Mr. Hiudt called Mr. Gordon Sherman and introduced me to Mr. Gordon Sherman over the phone and indicated to Mr. Gordon Sherman that I would be a good prospect to open a muffler
16 installation shop in the Washington, D. C. area.

* * *

30 Q. Now would you recall for us, as best you can, exactly what was said at this conversation?

A. Yes. Mr. Sherman indicated that he was pleased with my shop lay-out and was pleased with my appearance as a dealer and would be further pleased to franchise me under the Midas program. I indicated to him that I was interested in the Midas program provided I got assurances from him that the Washington metropolitan area would be assigned to me so that if I developed it I could reap the benefits of such development.

* * *

34 Q. Well, as I understood your testimony, you stated that in your conversations with Gordon Sherman in March of 1956 you brought up this territorial question as to you being assured the metropolitan Washington area.

A. That is correct.

Q. As I further understood your testimony, you
35 stated you did not go over the requirements of the franchise with Mr. Sherman, you went over them with Mr. Zuckerman prior to your conversation with Mr. Sherman?

A. I had seen the franchise form before Mr. Zuckerman came to town.

Q. Had you discussed it with Mr. Zuckerman prior to that time?

A. No, I don't think I did.

Q. But you had gone over it, yourself?

A. Yes.

Q. And the territory was the only requirement that you discussed with Gordon Sherman?

A. To the best of my recollection, yes.

Q. Had you noticed that the franchise contained a section concerning competitive goods?

A. Yes, I had, but at the moment, in the heat of going into a new program, I didn't pay too much attention to it.

* * *

55 Q. Was the matter of the entire Washington, D. C. territory ever discussed subsequent to the execution of the first License and Sales Agreement?

A. Yes.

56 Q. Can you tell us when and where, and with whom?

A. This was a telephonic conversation between myself in Washington, D. C. and Gordon Sherman in Chicago in the late summer of 1958. I had just completed opening the Alexandria shop, and I indicated to Gordon that I was ready to open up additional shops, especially in view of the fact that I was now devoting full time to the business. Gordon Sherman refused to give me permission for further expansion by stating to me that I was making so much money that I would soon not know what to do with it, and that this time would be better spent in consolidating my holdings and resting a little bit.

It subsequently developed as of the time of our conversation that Gordon Sherman had plans to restrict my expansion completely, and, as a matter of fact, he wanted to bring new dealers into the territory to give me competition.

* * *

100 Any other particular items that you recall that you purchased from outside suppliers?

A. For the same period?

Q. Yes, while you were in the Midas program.

A. Yes, I bought shock absorbers in the latter part of 1959 from Bill Zuckerman.

Q. Were those Monroe brand?

A. Yes, they were.

Q. Did you have any conversation with anyone from Midas about those purchases?

A. Not about those specific purchases, but I did have a conversation with Gordon Zuckerman.

Q. You mean Bill Zuckerman or Gordon Sherman?

101 A. Excuse me, I am sorry; with Gordon Sherman in the latter part of '58, in the same telephone conversation that I had that I referred to in my deposition yesterday. To bring you up, this was a conversation in which I asked Gordon if he would allow me to expand further.

During that same conversation, I indicated to him that it would be a good idea if the Midas shops were allowed to introduce the item of shock absorbers as one of the items to sell to the public, and Gordon Sherman disagreed with me at that time, and indicated that he couldn't give me the permission to carry shock absorbers in my shop because it would be contrary to the Midas image.

Subsequent to that, I had had conversations with Hal Krieger who is on Gordon Sherman's staff, at a meeting of Midas dealers at the Arva Motel in the Spring of '59, where I recommended to Hal that both shock absorbers and a separate, second line muffler be introduced as items to sell from the Midas Muffler Shops, and Hal Krieger's answer to my recommendation was that that would never be; it would never be allowed, and he was positive on that score in his statement to me.

• • • • •

119 Q. Did you at any time ever indicate to any representative of Midas or International Parts that you wished to be free of this price structure?

A. Yes, I spoke to Hal Krieger at the Arva Motel dealers' convention in the Spring of '59 that competition was increasing to the point that we required re-
120 lief either through the introduction of additional items such as shock absorbers and a second-line muffler, or allowing us to deviate from the price list in order to offset this tremendous competition.

Mr. Krieger was completely unsympathetic.

Q. What did he say, if anything?

A. He said, "It will never happen."

* * * * *

155 Q. Was there any occasion other than this spring of '59 meeting and your Fall of '58 conversation with Gordon Sherman, where you have raised definite objections to any part of the Midas program with any representative of Midas?

A. Yes, I recall speaking to Bill Zuckerman on occasion about the two percent advertising and about the freight bills that I was paying. By this time, I had learned what the trade was doing.

Q. With respect to what, the freight?

156 A. The freight.

Q. And what was that?

A. The trade generally shipped the merchandise, the freight prepaid, to the point of use, whereas Midas required that we pay the freight, and this amounted to eleven percent in my area.

Q. Now, International hadn't paid the freight, had they?

A. No, they had not.

Q. When you speak of the trade then, of whom are you speaking?

A. Goerlich Muffler Company, Maremont Corporation, Haviland Muffler Company, the companies that manufactured tailpipes at lower prices, such as the Williamsville, New York company, Texas Tailpipe Company, Carcrest Company, and a number of manufacturers who specialized in Hollywood mufflers, dual kits.

Q. What was Mr. Zuckerman's answer?

A. Generally speaking, his answer was, "You are making money, so why squawk?"

Q. Did you have any rejoinder?

A. I indicated to him that you made money in business from every conceivable source that money is to be made, and if there are price advantages, you should
157 be in a position to take advantage of them.

Q. To your knowledge, was that request of yours carried any futher than Mr. Zuckerman?

A. Not to my knowledge.

Q. And what was the nature of your complaint about the advertising sur-charge?

A. We had received a bulletin from Midas indicating that a pair of new shops in the Clifton Heights, New Jeresy area had been selected by Midas to test out a method of advertising, half-page newspaper mats, as opposed to the smaller newspaper ads that we were inserting. These ads were paid for, as I understand, by Midas and I felt that since I was paying a two percent surcharge, and if Midas was handing out extra advertising funds to a dealer, that I was entitled to a portion of these extra funds as was anybody else.

Q. You discussed this with Zuckerman?

A. Yes.

Q. To your knowledge, was that complaint taken any higher?

A. Not that I know of. Can I inject something in here?

Q. Sure.

A. About other areas that I complained about to
158 Bill Zuckerman.

Q. All right.

A. It may not be in line with what you previously asked me, but I objected to Bill Zuckerman to the fact that there were other dealers in the Midas program carrying shock absorbers with Midas approval, and I wanted to know why we weren't given the same authority, and Mr. Zuckerman told me that he also knew of these two shops, the ones that were located in Buffalo, New York, and one in Syracuse, New York, and that he had been instructed by Gordon Sherman at a Midas field representative's meeting in Chicago, to bring these dealers into line on their non-muffler lines, and he told me that he had been given specific instructions to go up there and clean them out, or else give them the ultimatum that Gordon Sherman had given him to carry out, which was to the effect of disenfranchisement.

* * * * *

166 Q. You were made aware of the decision on the guarantee that was made at the October, 1958 meet-
167 ing in Chicago, were you not?

A. All dealers got a letter to that effect announcing the change in policy.

Q. And was that from Gordon Sherman?

A. Yes, it was.

Q. What was your reaction to this letter?

A. It was a mixed reaction.

Q. Would you explain it, please?

A. I felt that the company was reneging on its policies stated in the franchise. I knew that this would have a bad effect on my profit picture because at this time my replacements were amounting to a substantial amount of traffic into the shop. At this period we were replacing in excess of 20% of the mufflers in proportion to those sold.

I felt that Midas was making the dealers petty for the full cost of the replacement program, and this was based on a statement of their production costs.

At this time I was beginning to feel the increased competition from other muffler installation activities in the city, in my territory, and I felt that it was not the cleanest thing that the company could have done.

* * * * *

188 Q. Calling your attention to Count III, Paragraph 21 of the complaint filed herein which alleges that the defendants granted discrimination in prices and services to certain of their customers without offering or otherwise making available those same prices and services to others of their customers including the plaintiffs. Would you detail for us what you understand is meant by those charges, Mr. Skarupa?

A. I don't know if I am qualified to give you an understanding?

Q. That is correct. What do you, Mr. Skrupa, understand the charges contained in that paragraph to be?

A. It is my understanding that certain International accounts received discounts that were not available to

Midas dealers and that they received full credit on
189 guarantee replacements when Midal dealers' replacement credits were reduced to 50%.

Q. Now would that apply to Boyd in Silver Springs?

A. I don't know whether he was getting the, any discount other than the 2% cash discount, but I do know that he was getting 100% replacement credits for any mufflers that went bad.

* * * * *

201 Q. Now isn't it a fact, Mr. Skarupa, that you had begun buying goods from outside sources as early as April of 1959?

A. Yes.

202 Q. And had anyone from Midas ever said anything to you about this?

A. No, because I kept the stock hidden.

* * * * *

271 Q. Now did you ever indicate to any such salesmen or representatives that the reason you wouldn't purchase was because of your Midas contract?

A. Yes.

Q. Which ones?

A. I remember specifically telling Mr. Lynch that I was barred from purchasing mufflers because of the contract, and certain of the clamp salesmen and the salesmen representing the spring manufacturing company. The same applied to the salesmen from the Monroe Shock Absorber distributor.

Q. Now was Mr. Lynch trying to sell you mufflers?

A. Mufflers and tailpipes and clamps.

272 Q. The full line?

A. The full line of automotive exhaust supplies and parts.

Q. Did he make any comment when you told him that you were barred by contract?

A. Yes. He indicated that he had run into this opposition in other areas throughout his territory, other shops throughout his territory.

Q. Was that the end of the conversation?

A. He made repeated calls thereafter despite the knowledge that he couldn't do business with us.

Q. What line of argument would he use to attempt to convince you to do business after finding out that you were barred by contract?

A. That we were losing profits to the tune of approximately 20 to 25% or better.

* * * * *

310 Q. And I believe you said that you had not calculated any amount as far as territory expansion, is that correct?

A. I have not, sir.

Q. Do you think that you can today?

A. We were of the opinion that a shop grossing a hundred thousand dollars in sales should realize a net profit of $20,000. approximately, and dependent upon
311 the number of shops we could have opened, this factor of $20,000. when multiplied by that number would give us an approximation of profits lost.

Q. How many shops do you think could have been opened?

A. I had indicated to Gordon Sherman at one time that I thought Washington was capable of supporting, under my administration, seven to eight shops.

* * *

In the District Court of the United States

* * (Caption—No. 60 C 1636) * *

* * * *

DEPOSITION OF CLAUDE WHEELER

7 Q. Was that the first experience you had with automotive exhaust parts?

A. Yes, sir.

Q. How did you happen to become interested in that business?

A. I saw it advertised in the paper and I was looking for something to get into. I saw it advertised, I believe, in Life Magazine the first time.

Q. I didn't catch that.

A. I saw it advertised in Life Magazine.

Q. Life?

A. Yes, they were advertising for dealers and I answered the ad.

Q. Did you write direct to Chicago?

A. Yes, sir.

Q. Then what happended?

A. They sent a representative to see me.

* * *

67 Q. And would you state the substance of the conversation?

A. I believed that we would have a year in 1957, we were starting out fairly well. I was getting to learn
68 the business, and I wanted to expand the business, and naturally Fitzshall had told me, though, if I didn't

expand it now that someone else would come into the market and leave me with just the one franchise, and I didn't want that to happen at this time so we proceeded to look for a building.

68 Q. Did Mr. Fritzshall indicate he had been instructed by anyone in the Midas organization to instruct you if you did not expand you would not get the additional territory?

A. Yes.

Q. And who so instructed him?

A. Mr. Gordon Sherman.

Q. At this time were there any other Midas shops
69 in St. Louis?

A. No.

Q. In the St. Louis area?

A. No.

Q. Did you indicate any disagreement with Mr. Fritzshall about expanding at that time?

A. I would like to have waited until the first shop got to producing at that time.

Q. Did you so inform him?

A. I informed Mr. Frizshall, yes.

Q. Anybody else?

A. He was the only one.

Q. What was his reply?

A. Well, it was the same thing, if I didn't do it, why, then they would have to go find another person to take a franchise.

* * * * *

92 Q. What was the substance of the conversation?

A. Mostly it was about the exclusive. I wanted an exclusive franchise since I was going to open a third shop

under, you might say, a little pressure, because opening three shops in a twelve-month period was a pretty good strain.

Q. You wanted an exclusive for the entire St. Louis area, is that correct?

A. Yes.

* * *

111 Q. Did you have any conversations with anyone from Midas with respect to the purchase of outside goods during 1958?

A. Yes. I had talked with Mr. Fritzshall because I was beginning to get calls from other factories to sell me products that I could possibly use, and that I could have bought at substantially less than I was paying for Midas.

Q. Do you remember when the first conversation was in '58?

A. Not precisely.

Q. Were these general conversations all through the year?

A. Yes, sir.

Q. Could you give us the substance of them?

A. The substance of the conversations?

Q. Yes.

A. Just the fact that I was being offered these
112 mufflers and pipes at a substantially lower price. Of course, he indicated that that would not be possible because it was against Midas policy. He indicated to me that some of the fellows who were doing it were subject to get their franchise taken away.

* * * * *

128 Q. Is his the first time you consulted a lawyer in connection with any of these franchise agreements?

A. Yes, sir.

Q. What caused you to consult him at this time?

A. Well, I had made mistakes before in agreements and locations and I wanted to be sure that this just didn't happen again.

Q. In what way had you made mistakes?

A. In the first one we settled for too small a territory, and the second and the third there were certain restrictions in the franchise that would keep me from buying related products.

Q. When was this store opened?

A. The Rock Road Store?

Q. Yes.

A. In June of 1959.

Q. When did you receive the Midas form of franchise?

A. It must have been approximately a month before because we closed the Grand Avenue in May of 1959. In the process of moving it, during the month, I think
129 we received the new franchise.

Q. Now when you sent it back did you send an explanation with it?

A. I don't remember if I did or not.

Q. Are you sure you sent it back?

A. I believe that we did.

Q. Did you just put it in an envelope and send it back without any letter or anything else?

A. I gave it to my attorney, I am sure. I don't know if he wrote a letter with it or not.

Q. Oh, you didn't return it? If it was returned it was returned by your attorney, is that correct?

A. Well, I talked with my attorney about it and if there was a letter written, why, I am sure that he sent it with the franchise.

Mr. McGee: Would you repeat my question?

(Question read.)

A. Not necessarily.

Q. You don't know. Tell me this, if this is correct, that you don't know whether it was returned or not?

A. I am not sure.

Q. If it was returned it could have been returned
130 by either you or your attorney, is that correct?

A. That is correct.

Q. And if a letter accompanied the return of the document the letter was written by your attorney and not by you, is that correct?

A. That is correct.

Q. What provisions of this particular contract did you object to?

A. Not being able to buy from other manufacturers as well as I remember was one, or not being able to handle allied products and the territory for another. And I believe this franchise had the 50 percent guarantee written within it. I didn't agree with that.

* * * * *

150 Q. Did you ever purchase any pipes from Texas Tailpipe Company?

A. No, sir.

Q. Did you ever have any conversations with anybody from that company?

A. Yes.

151 Q. When was the first such conversation, if you recall?

A. The latter part of '57, or the first part of '58. I am not sure.

Q. Was that a sales representative?

A. Yes. There was a sales representative.

Q. Did he call at your place of business?

A. Yes, sir.

Q. What was the substance of the conversation?

A. He tried to sell me Texas Tailpipes. He tried to show me where I could buy pipes from Texas cheaper than I could buy them through my supplier who was Midas.

Q. What did you say to him?

A. I explained to him that I had a franchise, that I couldn't buy pipes through anyone else but Midas.

Q. Did you ever discuss this with anyone from Midas?

I am sure Fritzhall and I had talked about Texas Tailpipes.

Q. Do you recall the substance of that conversation?

A. Well, I had pointed out to him that I could buy pipes cheaper if I bought through Texas Tailpipe. I could save a considerable amout of money. I could save a considerable amount of money in the year's purchase.

Q. What was his reply?

A. Well, he explained to me that I should know
152 by now that I wouldn't be able to purchase from outside sources because of the fact that I would get my franchise cancelled and he explained to me that others had their franchise cancelled from the purchase of outside products.

• • • • •

232 Q. But I think that you have previously mentioned that you were cited examples of Sarasota, Florida, is that correct?

A. Yes, I believe that was one of them.

Q. And Mr. Pierce of Syracuse?

A. Yes.

Q. Any others?

A. We had talked to several different dealers who were handling other products, and it was the Midas policy that they should never handle them.

Q. Well, my question for the moment is limited to automotive exhaust systems.

A. Or to even purchase from other sources.

Q. Were there any other examples that you can give or recall other than those two which I mentioned?

A. Not that I can recall right at this time.

* * * * *

233 Q. My question is: did anyone ever threaten you with cancellation if you did so?

A. They had told me that the franchise—I would lose my franchise if I bought from outside sources.

DEPOSITION OF GORDON BERNARD SHERMAN

78 Q. Thank you.

Now, is the exhaust pipe a trade mark item?

A. I don't know.

Q. Let me put it another way; is there a trade mark on the exhaust pipe?

79 A. I don't believe so.

Q. And is there a trade mark on the tail pipe?

A. I don't believe so.

Q. And is there a trade mark on the—did you say clamps?

A. Yes, I said clamps.

Q. Is there a trade mark on the clamps?

Let me be more precise than that, sir. Is there a trade mark physically affixed to the clamps in any fashion?

A. I don't believe so.

Q. Is there a trade mark physically affixed in any fashion to the hangers?

A. I don't know.

THE DEPOSITION OF ROBERT T. SCHROEDER

11 Q In 1955, if you can remember, sir, who was International Parts purchasing mufflers from?

A International Stamping, Metco. I believe that is all.

* * * * *

14 Q Well, when you ordered, let us say, a muffler, how did you describe that muffler to either International Stamping or Metco?

A By stock number.

Q Now, where did that stock number come from?

A I don't understand your question.

Q Well, was that a stock number promulgated by International Parts Corporation or was that stock number promulgated by Metco or International Stamping?

A By International Parts.

Q Was Metco familiar with International Parts Company numbers to your knowledge?

A Yes.

* * * * *

22 Q Now, in 1955, when you placed an order for mufflers from Metco, was there any difference in the muffler which was branded International and the muffler that was branded Midas, except for the identification of brand?

A I don't believe so.

Q Was the same true in 1956?

A Yes.

Q Was the same true in 1957?

A Yes.

Q Was the same true in 1958?

A Yes.

Q Was the same true in 1959?

A No.

Q What was the difference in 1959?

A In 1959, the design of the Midas muffler was changed. The outward design was changed to a diamond design. Heavier gauge steel was used throughout the Midas muffler as compared to the International.

Q Did that condition or did those changes persist in 1960?

A Yes.

* * * * *

23 Q In 1955, was there any difference between the muffler to be purchased from Metco and the muffler you purchased from International Stamping?

A I don't believe so.

* * * * *

24 Q Now, sir, in connection with your purchasing from International Stamping for the year 1955, was there any difference in quality or design in the muffler

which you purchased from them that was marked International than there was in the muffler which was marked Midas?

A No.

Q Did that same condition exist in 1956?

A Yes.

Q And did it persist in 1957?

A Yes.

Q Did it persist in 1958?

A Yes.

Q Did it persist in 1959?

A No.

Q I take it the same thing happened in 1959, with respect to International Stamping that happened with respect to Metco?

A That is right.

Q Now, in 1956, was International Parts purchasing mufflers from anyone other than International Stamping or Metco?

A I believe so, yes. If Muffler Corporation was in existence at that time.

Q Muffler Corp. would be the only additional—

A Right.

Q —source?

And in 1957, we will assume and we will verify the date later that Muffler Corp., was in existence if it was or it wasn't, were International Stamping, Metco and Muffler Corp. the only sources of supply for International Parts Corporation?

A Yes.

Q And were these the only sources for the year 1958?

A Yes.

Q Were these the only sources for 1959?

A Yes.

Q And were these the only sources for 1960?

A Yes.

* * * * *

55 Q Now, with reference to the other items which included on this list which we just went over which International purchased; was a brand name stamped on such items by the manufacturer or by International Parts?

A. I don't believe so.

* * * * *

56 Q Was the Midas name placed on any of these items by putting the item in a box with a Midas name on it or by attaching a tag with a piece of wire or string during any of the period 1955, through and including 1960?

A Not to my knowledge.

* * * * *

DEFENDANTS' DEPOSITION EXHIBITS[8]

DX 6

November 13, 1959

Midas, Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Gentlemen:

Under paragraph V of your license and sales agreement dated December 4, 1958, between Midas Muffler Shop of Grand Rapids, Inc. (Midas of Grand Rapids, Inc.) and Midas, Inc.; you are hereby notified of our intention to terminate this agreement at the close of business December 12, 1959.

Very truly yours,

MIDAS OF GRAND RAPIDS, INC.

Maxwell E. Ross, Pres.
M. E. ROSS

* * *

[8] The exhibits marked at defendants' depositions of plaintiffs (DX 1-DX 201) were transmitted to this Court under a separate certificate by the District Court Clerk. The reference to those exhibits, pages 103 to 109 hereafter, are to the original deposition exhibit numbers.

DX 7

November 13, 1959

Midas, Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Gentlemen:

Under paragraph V of your license and sales agreement dated December 4, 1958, between Midas Muffler Shop of Muskegon, Inc. (Midas of Muskegon, Inc.) and Midas, Inc.; you are hereby notified of our intention to terminate this agreement at the close of business December 12, 1959.

Very truly yours,

MIDAS OF MUSKEGON, INC.

Maxwell E. Ross, Pres.
M. E. ROSS

* * *

DX 25

Midas, Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Gentlemen:

You are hereby notified that I am cancelling the Midas franchises for the following Midas Muffler Shops effective sixty days from this date, namely February 11, 1960 being the termination date:

Perma-Life Mufflers, Inc.
T/A Midas Muffler Shop
2652 University Boulevard, West
Wheaton, Maryland

Perma-Life Mufflers of Arlington, Inc.
T/A Midas Muffler Shop
2115 Wilson Boulevard
Arlington, Virginia

Perma-Life Mufflers of Prince Georges County, Inc.,
T/A Midas Muffler Shop
3646 Bladensburg Road
Cottage City, Maryland

Midas Muffler Shop of Alexandria, Va., Inc.,
T/A Midas Muffler Shop
1912 Duke Street
Alexandria, Virginia

Very truly yours,

Gregory T. Skarupa

Gregory T. Skarupa

* * *

DX 26

Advertisement

MUFFLER SHOP SECRET EXPOSED
By Greg Skarupa

To my many friends and customers. I thought you'd like to know that I am no longer associated with Midas.

I've re-established my original business name, PERMA-LIFE MUFFLERS, just so that I can introduce a superior heavy duty auto muffler in the Washington area. It's aluminum-zinc coated inside and out, with asbestos interlining between the coated multi-wrapping where needed for heat control.

It's the *only* muffler in this area that is fully guaranteed *in writing* against rusting out. This is the muffler I will

install in honoring all of the guarantees I have issued in my five years of muffler sales and servicing. So, come see me. I'm still doing business at the same old stands, in Arlington, Alexandria, Cottage City and in Wheaton where we have moved to new enlarged quarters at 2404 Price Avenue (corner Georgia and Price next to Wheaton Safeway). Just look for the PERMA-LIFE MUFFLER SIGNS.

* * *

DX 45

September 4, 1959

Midas, Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Gentlemen:

Pursuant to the provisions of Section V of each of the License and Sales Agreements between myself and Midas, Inc., I hereby give written notice of my intention to terminate all said agreements on November 9, 1959, said date being more than 60 days from the date hereof.

As of said date, November 9, 1959, all said agreements are and will be terminated.

Yours very truly,

Claude Wheeler

Claude Wheeler

* * *

DX 53

February 25, 1959

Mr. Gordon Sherman, President
Midas, Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Dear Gordon:

Our muffler replacements for the month of January were 326. Our cost of replacing these mufflers under the present guarantee policy is approximately $1,000.00.

At this rate, with January being a slow month, we can expect our share of the replacement cost to be about $20,000 this year.

I have no fault to find with your 50/50 replacement policy, were it to apply to the new muffler only. The 50/50 replacement cost on the old muffler does not seem fair.

I personally feel the fault lies in the quality of the muffler. I am sure our replacements would be very few and far between if we had had a quality muffler to begin with.

I am writing you in all fairness and stating my dissatisfaction with the present program. If I should decide to make a change in the future I would like this to go on record as to the reason why.

Very truly yours,

MIDAS MUFFLER SALES & SERVICE

Joe

J. C. PIERCE

* * *

DX 56

PIERCE MUFFLER SHOPS INC.
1205 ERIE BLV'D., E.
SYRACUSE, N.Y.

December 22, 1959

Mr. Robert M. Jacob
Director of Franchises
Midas Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Dear Mr. Jacob:

We are making arrangements to return the Midas muffler stock we ~~have on~~ hand as of December 31st. This shipment will be made on a C. O. D. basis. The mufflers to be returned may be examined by one of your representatives before shipment. Naturally we presume we will have the right to sell any mufflers not accepted for return.

I can assure you we are willing to cooperate fully with your request to terminate the Midas franchises we hold as of December 31, 1959.

To date we have returned approximately 2500 muffler plates and guarantees to your warehouse and have not received any credit for these. It is my understanding that you will allow credit for any muffler plates and guarantee returns up to January 10, 1959.

At this time we have a credit balance on our account in the amount of $816.29.

We will make the return of mufflers to you provided you advise your acceptance and/or exceptions to the above-mentioned stipulations regarding the return of our Midas

muffler stock, as well as the status of the guarantee returns we have made.

Very truly yours,

PIERCE MUFFLER SHOPS INC.
J. C. PIERCE

JCP:dmb

401613

• • •

MEMO

FROM

MIDAS, INC. - State and 11th Streets - Chicago 5, Illinois

P-9-2278 APPENDIX 10A

July 1, 1957 57-117

TO: All MIDAS Representatives

FROM: Gordon Sherman

SUBJECT: Muffler Clamps and Hangers

The attached 1957 MIDAS MUFFLER CATALOG SUPPLEMENT is being sent to all of our MIDAS dealers. You will receive it through the mail along with them.

The most outstanding feature of this supplement is our complete listing of the most thorough MUFFLER CLAMP AND HANGER LINE in the industry. This is the result of intensive work over a long period of time and is meant to supply your MIDAS Shops with a line that is tailored to their every requirement through and through. It is a specialized line for MIDAS Specialists.

Now is the time that we step forward and formally ask that all of these parts be bought through MIDAS.

Clamps and hangers are as much a part of our MIDAS line as our No. 779 mufflers. Clamps and hangers should be purchased through MIDAS as part of MIDAS membership. We have bulk packages for the more popular numbers, as previously announced, as so are able to offer these clamps to our people competitively with the legitimate market. Please see to it that this proper loyalty to the program is demonstrated by all of your shops and emphasize the value and completeness of this clamp and hanger line.

Gordon Sherman

12[illegible]

Appendix 7

MEMO FROM MIDAS

MIDAS, INC. - State and 11th Streets - Chicago 5, Illinoi

July 1, 1957 57-118

Pl. X 19-il

TO: All MIDAS Representatives

FROM: Gordon Sherman

SUBJECT: Basic MIDAS Policy - EXCLUSIVENESS

As you know; as we have repeatedly impressed upon you from the very beginning of the MIDAS program; no side lines are allowed in MIDAS MUFFLER SHOPS.

It seems almost unnecessary that this basic principle of MIDAS should require re-emphasis at this late date but, for the sake of clarity, we <u>are</u> re-emphasizing it -

> THE MOST SACRED PRINCIPLE OF THE MIDAS PROGRAM IS THAT ALL MIDAS SHOPS ARE MUFFLER SPECIALISTS, AND NO SIDE LINES ARE PERMITTED IN SHOPS THAT IDENTIFY THEMSELVES WITH THE MIDAS PROGRAM.

This refers to all services and products not directly related with automotive exhaust systems, and it includes such itmes as springs, brakes, non-exhaust accessories, shock absorbers, etc. etc. etc.

It also refers, of course, to any merchandise not carrying the MIDAS brand.

Our policy in this matter is simply one of requiring that those people who are part of the program are part of it all the way. Anyone who defaults on this policy harms the program, weakens our formula of success and does himself no good, for this policy is directed toward the permanent and substantial progress of <u>each</u> individual MIDAS Shop. See to it that it is enforced and tell us where it isn't.

Gordon Sherman

MEMO

Appendix 8

MIDAS, INC. - State and 11th Streets - Chicago 5, Illinois

M57-135

July 24, 1957

TO ALL REPRESENTATIVES

The subject to be disclosed in this bulletin is one which, in the interest of discretion and good taste, we would not make known to you were it not that the embarrassment caused by it has already been made public.

Therefore, in the interest of your enlightenment, we present the facts regarding the MIDAS MUFFLER SHOP of Sarasota, Florida! Many of you and many of your MIDAS dealers have had occasion to note in a recent issue of the BRAKE SERVICE MAGAZINE an article discussing brake service in connection with a muffler shop in Sarasota, Florida. This was a MIDAS shop which conducted its brake service without our knowledge and allowed the magazine article to be printed without first notifying us. Because some of your loyal and enthusiastic MIDAS dealers may ask you of this matter, we feel you should know that, as a result of the violation of the MIDAS franchise and the embarrassing article describing it, this SHOP is no longer a member of the MIDAS program.

Gordon Sherman
Director of Sales

MIDAS URGENT MEMO

No. 06413

Bron Through
APPENDIX II

From GORDON SHERMAN To ED KELLERMAN Date 10-15-57

Subject: MIDAS "SUB-AGENCY" - INDIANA, Pa.

FOR OFFICE USE
11-5-57
PENDING DATE

MO

The matter of wholesaling MIDAS mufflers has been taken up with all members of the N.A.C. and they have agreed to a policy which forbids it.

I am therefore sending the enclosed material back to you so you can make sure this policy is followed throughout your territory.

Certainly Johnson Bros. Garage and their supplier of MIDAS should have your initial attentions in this assignment.

REPLY

SENDER'S FILE COPY

IIDAS URGENT MEMO

APPENDIX 12

No. 06434

file

From: GORDON SHERMAN To: BERT HERSKEE Date: 10-28-57

Subject: MIDAS MUFFLER SHOP, Manchester, N.H.

#65

FOR OFFICE USE
11-15-57
PENDING DATE

9 2071

10 Subject ordered spark plugs. We do not ship these by policy. I suggest you reaffirm this policy since subject must not handle anything other than the merchandise supplied by us.

REPLY

Plugs for Cadilac are for personal use. Other order for stock along with tips. Cancel stock order and ship personal order for Cady tips. Policy was well reaffirmed today.

13

REPLY AND RETURN THIS SHEET TO SENDER

MIDAS URGENT MEMO

APPENDIX 13

No. 06437

From: GORDON SHERMAN To: BERT HERSKER Date: 10-29-57

Subject:

FOR OFFICE USE

11-29-57

PENDING DATE

9.2678

MEMO: Speaking with my father on the phone regarding his current trip to the east, I was surprised to hear from him that some MIDAS shop in your territory has been picking up heavily at a local muffler warehouse. Of course this is not official, but the figure of $600 in the name of Maremont was mentioned. My father was not in a position to check in detail with his source of information and of course we turn to you. There is, without doubt, no area of greater violation against the franchise than this.

I should like to know if any evidence of such practice has come to your attention and of course I want you to be very alert to notice this sort of thing.

We'd like to take it for granted that our franchisees are loyal and, of course, your job is to see that the attitude of mutual loyalty prevails. As things stand now we are able to supply completely all requirements of our shops. They should buy nothing elsewhere and if they consider themselves compelled to "fill in" they should increase their stocks of basic material at once.

REPLY

180

13

SENDER'S FILE COPY

MIDAS URGENT MEMO

#50

APPENDIX 14

No. 06780

RMY

From GORDON SHERMAN To LEN REIS Date 2-11-58

Subject: MIDAS MUFFLER SHOP, PENSACOLA, FLORIDA

FOR OFFICE USE

2-28-58

PENDING DATE

MEMO

Mike Gup indicates that this shop is selling wholesale across the counter. You know, Len, from our NAC meeting, that this is in contravention of our policy.

Please give me a report on this.

REPLY

I was in Pensacola last Wed. and Thurs. and of course discussed this problem with Mike and Bill Eade. After investigating, I found that Bill has done a pretty good job of trying to keep his wholesaling within the Midas concept, and inasmuch as his is the most complete stock of tail pipes and exhaust pipes within a fifty mile radius of Pensacola, the dealers have been forced to call upon him despite their averse sentiments. As you know, we love Mike and he is a good IP account, but we must keep those grains of salt handy to sprinkle over his complaints. You undoubtedly are aware that Mike has an installation shop too, and his advertising is for the shop, not for his wholesale end. The only opinion voiced by Bill regarding Mike's operation is "I hope this is worst competition I'll ever have." You also know that construction is under way for the new Midas Shop, and with any kind of break in the weather, Bill should be in it by April 1st. The solution to the whole problem, something

REPLY AND RETURN THIS SHEET TO SENDER

Appendix 40

the
MIDAS
field
counsellor   confidential memo from gordon sherman

MIDAS #58-564
March 31, 1958

MIDAS HOLLYWOOD MUFFLERS

We now have a complete stock of MIDAS Hollywood mufflers. In accordance with the NAC recommendations, these are unlabeled and unbranded. They merely show the stock number. A complete listing of these numbers and their applications has been prepared and a sample of it is attached to this bulletin. These listings are being sent to each of your dealers.

Now that we have this complete line of very acceptable packed-type mufflers, the time has come for us to enforce that policy which we have deliberately neglected until this time: We now require that all MIDAS Muffler Shops purchase their Hollywood mufflers from MIDAS exclusively. This is somewhat overdue since the convention last year, and we have long since prepared our dealers to accept this line as part of their overall participation in the MIDAS program. Take it from there.

APPENDIX 4

#42

the
MIDAS
field
counsellor confidential memo from gordon sherman

July 13, 1958
MIDAS #58-636

MIDAS HOLLYWOOD MUFFLERS

Are all of your MIDAS dealers buying their Hollywood mufflers and dual kit requirements from MIDAS?

They should, you know, insofar as we can provide this material. This was agreed upon long ago as basic to the program.

We now make a glass pack muffler that can more than support their esteem. We were frank to admit when we did not have such a muffler, but that is long past.

Please do not be casual or slipshod in attending to this part of the program.

PLAINTIFF'S EXHIBIT 41

TEXAS TAIL PIPE CO.

4310 Langley, P. O. Box 1107

Houston 1, Texas

Price List Effective July 31, 1958

Supersedes All Previous Lists

Phone: Hillcrest 2-2548

Jack Marshall
5 Maple St.
Salem, Mass.—PI 4-7167

FORD TAIL PIPES:	A-P	Maremount	Int'l	Walker	McCord	Jobbers Blue Sheet List	Our Price
49 thru 51 All Models 6 & 8	296	432	220	2055	1639	$ 2.07	$1.75
52 & 53 V8 All Models	408	544	540	2212	1655	2.07	1.75
54 Main & Custom 6 Cyl.	407	545	538	2211	1653	2.07	1.75
54 Main, Custom & Crest V8	445	598	704	2237	1749	2.39	2.00
55 Main, Custom V8	483	666	753	2327	1793	2.07	1.75
55 Fairlane, Right Hand	484	631	778	2321	1794	2.07	1.75
55 Fairlane, Left Hand	485	624	750	2322	1795	2.07	1.75

56 Fairlane, Hight Hand	578	765	2600	2374	1915	2.07	1.75
56 Fairlane, Left Hand	579	742	2601	2375	1916	2.07	1.75
55-56 Sta. Wagon, Right Hand	482	655	830	2325	1792	2.07	1.75
55-56 Sta. Wagon, Left Hand	481	652	752	2326	1791	2.07	1.75
57 Ford Fairlane, Right Hand			2626			3.55	2.65
57 Ford Fairlane, Left Hand			2627			3.55	2.65
CHEVROLET:							
51 & 52 6 Cyl.	328	441	467	2070	1617	1.92	1.70
50 & 53 6 Cyl. Power Glide	327	385	428	2091	1685	1.92	1.70
54 6 Cyl.	440	576	662	2235	1740	1.92	1.70
55-56, 6 & 8	490	632	745	2286	1776	1.85	1.70
50-53 Incl. ½ Ton Pickup	335	575	499	2277	1637	1.39	1.23
PLYMOUTH:							
51-52 Mod. P 23	444	484	224	2175	1605	2.26	2.00
53 Mod. P 24	428	523	575	2167	1714	2.26	2.00
54 Mod. P 25	467	568	714	2245	1755	2.26	2.00
55-56, 6 Cyl. Mod. P 26	506	659	2417	2438	1779	2.26	2.00

MERCURY:

55-56, Right Hand	520	667	783	2317	1803	2.83	2.50
55-56, Left Hand	522	700	785	2315	1773	2.83	2.50
55-56 Sta. Wagon, Right Hand	551	704	818	2318	1851	2.83	2.50
55-56 Sta. Wagon, Left Hand	550	775	817	2316	1852	2.83	2.50

TERMS: 1%—10th Prox., TAX included.

WE WILL PUT NUMBER OF MFRG. THEY ARE BUYING FROM ON EACH TAIL PIPE.

DELIVERED PRICES—MINIMUM ORDERS OF 50 PIPES.

Above prices are freight allowed in the states of:

Texas, Oklahoma, Louisiana, Arkansas, Missouri, Kansas, Georgia, Alabama, Florida, Mississippi, Tennessee, Kentucky, North Carolina, South Carolina, Virginia, West Virginia, Iowa, Nebraska, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Indiana, Ohio, Pennsylvania, New York, New Jersey, Maryland, Delaware, District of Columbia, Michigan, Massachusetts, Rhode Island, Connecticut, Colorado and New Mexico.

(THESE PRICES ARE SUBJECT TO CHANGE OR WITHDRAWAL WITHOUT NOTICE)

the
MIDAS
field
counsellor

confidential memo from gordon sherman

PX 12 1d
4-18-61
W.S.

August 13, 1958
MIDAS #58-650

TEXAS TAIL PIPE CO. OF HOUSTON

I have attached to this bulletin a circular, a copy of which has been sent to all MIDAS Shops.

The Texas Tail Pipe Co. of Houston is a bit of a scavenger (there is nothing wrong with being a scavenger except that we do not like them) to the muffler industry. These people make a small assortment of popular numbers and distribute them at unjustifiably low prices.

It is of course essential to participation in the MIDAS program that our dealers do not buy this merchandise.

HEADQUARTERS FOR THE MIDAS MUFFLER SHOP NETWORK

4101 West 42nd Place, Chicago 32, Illinois

LOUIS GURNICK
580 Kincaid
Highland Park, Illinois
Phone IDlewood 2-6408

9/26/58

Dear Max,

After receiving a very "frightened" letter from Jim Madison I called him. It seems he is ready to "flee the coop." He is so petrified that I am sure he will abandon his Minneapolis residence. Of course, Midas will compensate him for the merchandise. We do not want the Midas mufflers falling into strange hands. It won't do any of us any good to "push" Mr. Madison. He would go broke in the near future.

I'll have to get up there next week to lend a guiding hand.

After doing some "tall thinking" I have come to the conclusion that you and I should have a meeting first before any meetings are held in Chicago.

MIDAS

MUFFLER INSTALLATION DEALERS ASSOCIATED SERVICE

Sheet #1

HEADQUARTERS FOR THE MIDAS MUFFLER SHOP NETWORK

4101 West 42nd Place, Chicago 32, Illinois

LOUIS GURNICK
580 Kincaid
Highland Park, Illinois
Phone: IDlewood 2-6408

There is a great deal to be done before Gordon is drawn into the picture. I really think it would be premature to have a top level meeting now. Many things have to be considered such as the cities like Benton Harbor, Battle Creek, Holland and another shop in Grand Rapids — before we can think of any cities outside of Western Michigan. The true volumes in Muskegon and Kalamazoo have not been exploited to the fullest extent — What about the glass business which is against Midas policy? These points are in the limelight.

I felt would achieve your objective more fully and concretely if we could resolve the above matters and then invite Gordon to Michigan to show him the progress; and then your long range mission could be fulfilled — I'd like to hear from you.

Regards,

Lou

PC #14 for info 5-4-61

Small # 2

LIFE MUFFLER INSTALLATION DEALERS' ASSOCIATED SERVICE

PX 11 18
4-18-61
WJS

the
MIDAS®
field
counsellor   confidential memo from gordon sherman

MIDAS #58-677
October 15, 1958

BUYING FROM OUTSIDE SOURCES

Several bulletins have gone forward to you describing the possible dereliction of some dealers in the direction of tail pipes and clamps of non-MIDAS origin. In a recent trip I have had opportunity to observe this felony and can now tell you what to look for.

The Texas Tail Pipe Company continuously circularizes our dealers. Tail pipes are all but anonymous except for the identifying band or label. The Texas Tail Pipe Company has a yellow "scotch tape" type band with red printing. This looks something like the type of tail pipe identification band that we use for pipes sold with dual exhaust kits...while our regular color scheme is merely black print on white tape. We use the yellow and red combination to indicate to the dealer that the pipe on which it appears belongs with the dual kit and should not be sold separately.

The Texas Tail Pipe Company also identifies pipes with a small strip of yellow scotch tape that does not completely encircle the pipe. While this identification may be deceiving at first glance, it will be clear on any kind of inspection and you are urged to be alert to it.

The purchase of such pipes is usually done in quantity since only a few numbers are listed by this scavenger company and a significant quantity is required for economy in shipment. We regard this kind of promiscuous buying as a capital offense in MIDAS. It is inexcusable and it is hostile in the extreme to the program. You cannot work with a dealer if this kind of thing prevails.

T

APPENDIX 4

October 15, 1958

MEMO TO: MIDAS DEALERS

FROM: LOU GURNICK

SUBJECT: SHOP BUYING PRACTICES

1) It is Midas policy that you buy your clamps exclusively from Midas.

2) It is Midas policy that you buy your "Hollywood Mufflers" from Midas.

3) It is Midas policy that you buy your tailpipes from Midas.

Your complete participation in the Midas Shop Buying Policy is requested.

The next time I visit your shop, we can go into this matter more fully.

LG:J

646940

MIDAS URGE T MEMO

DX 1548
4-18-61
WTS

No. 10627

From: Lou Jurwich To: Max Ross Date: 10/31/59

Subject: Clamps — purchase of by Grand Rapids.

FOR OFFICE USE

PENDING DATE

MEMO

Gordon Sherman advises you are not purchasing popular clamps from Midas.

You are only purchasing a small quantity of special type clamps.

The clamps are priced right, and even more important it is part of the policy to make supply purchases from Midas.

Please comply and cooperate in the future — if any ideas to the contrary please let me know. I have to report the results to Gordon Sherman.

REPLY

194

REPLY AND RETURN THIS SHEET TO SENDER

BARCO INC.-CHICAGO

APPENDIX 15

the
MIDAS®
field
counsellor

confidential memo from gordon sherman

0 3080

March 25, 1959
MIDAS #59-1053

TAIL PIPE PURCHASES

When a dealer signs a franchise with us he commits himself undeniably to certain basic practices in our program. Paramount among these is his consistent and exclusive purchase of our products. Our dealers have become so dedicated to our mufflers that I believe there is no question on this, but it is possible that some of them regard our tail pipes and our clamps as a kind of afterthought to which "loyalty" does not apply. You have all been aware of this as you also have been aware of certain tail pipe companies who manufacture short lines of easily produced numbers at discount prices.

(On the other hand, many of our newer dealers, while fulfilling this aspect of their franchise commitments, have simply not sold enough tail pipes at all. We believe that this is so because as inexperienced dealers they tend to think of their business primarily in terms of mufflers and have not learned how to "sell" in the sense of examining their customers' entire exhaust system needs.

These two separate factors then combine to reduce to some uncertain degree our sale of tail pipes and clamps in MIDAS.

To help you isolate those dealers in need of attention along either of the lines I have indicated, we have been studying each and every MIDAS order as it is processed for shipment. We shall continue to do this indefinitely. It is this procedure that enables us to discover that for one reason or another some dealers are not buying "enough" pipes from us. We now have our first report from this project and are printing below the locations of those in question as follows:

West Springfield, Massachusetts	Port Arthur, Texas
Albuquerque, New Mexico	Norfolk, Virginia
Raleigh, North Carolina	Roanoke, Virginia
Philadelphia, Pennsylvania	Syracuse, New York
Pittsburgh, Pennsylvania	New Orleans, Louisiana
Florence, South Carolina	Oakland, California
Spartanburg, South Carolina	San Diego, California
Memphis, Tennessee	San Jose, California

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PLAINTIFF'S EXHIBIT 4.

MIDAS, INC.

Headquarters for the Midas Muffler Shop Network
4101 West 42nd Place, Chicago 32, Illinois

May 26, 1959

Mr. Max Ross
Midas Muffler Shops
1020 E. Columbia
Battle Creek, Michigan

Dear Max:

It is the purpose of this note only to acknowledge your letter of May 23rd and its enclosure.

I have brought the subject of your letter to the attention of Lou Gurnick, asking him to explain our views on the subject and express our wonderment that you should feel restricted by the Midas maintain-the-price merchandising. I feel that Lou could do this better in person.

Meanwhile, with kindest regards and best wishes for your unhampered progress in Battle Creek, I am

Sincerely yours,

Gordon

Gordon Sherman

GBS:af
c/c Lou Gurnick

the
MIDAS
field
counsellor   confidential memo from gordon sherman

0151

October 8, 1959
MIDAS ~~#110.~~ 1148

MEETING

I have talked with many of you this past week about a meeting and in most cases we concluded that it is downright urgent...hence the bulletin written to you by Bud Jacob announcing our Field Counsellor meeting on Sunday, October 18th.

We have not yet planned the meeting and we are not sure that we will at all. All eight of you will be present, together with Bud Buchman and Ernest Kuhn, Assistant Field Counsellors. Bud, Hal and I will complete this intimate group with perhaps an occasional visit from Bill Lundin and Dave Silbert.

The meeting will be informal and most likely un-agendaed; but we want its discussions to center around a basic, critical area in program planning:

> We must re-appraise our relationship with our dealers with a view to greater program security.
>
> We must be prepared to redirect our philosophy of leadership if we think it necessary, and we must be prepared to make tangible changes within the program structure itself if our philosophy so directs.

Almost every one of you has an interesting story or two to tell arising from your recent adventures with your dealers and tending to offer all of us important material for consideration as we re-evaluate our status.

Here, opposite each of your names, are the stories that I want you to be prepared to tell briefly and factually:

BURT GRACE	The Claude Stibbs story. Luke Wotherington - source of a new policy. Lou Silverman wants it all. The Herb Gaines-Al Green story. How things stand with Greg Skarupa.
LOU GURNICK	The facts on Claude Wheeler. Max Ross wants a fifth shop. Max Ross cuts up in Battle Creek. Splitting Fritzshall's market. Securing a new dealer in Omaha. Vengeance in Lansing.
IRWIN LISS	Debunking George Coumos. The Harold Koordhoek story...the new shop and our option to buy his old shop. Warren Pickering's second shop.

13

9 2155

MEETING

October 8, 1959
MIDAS #1187

HUGH MacLEAN	The Milt Abramson history. Recent developments with Johnny Rodosta.
LEONARD SELIGER	Catching up with the Katz brothers. The Saul Doppelt switch in shops. Securing Columbus locations.
HOWARD SHERMAN	Breaking our expansion commitment with Herbert Marchick.
MARC VOSK	How much can we take from Joe Pierce? A report on springs and shocks in Buffalo.
KEN WARSCHOFF	Hysteria in Louisville.
BUD JACOB	After Brodie's hide in Detroit

I do not mean that there will be a straight presentation of all of these stories one after another. They do represent a catalogue of very significant experience, and I ask that each of you be prepared to present them so as to illustrate the lessons they tend to teach. It is from these experiences that we shall try to discover what's to become of us.

I don't know how long the meeting will last. I trust that its very informality will make for a kind of relaxation which may make it longer but more pleasantly productive...maybe through Tuesday afternoon.

One more thing: I hope that our approach will be so clearly focused on this single problem area that we shall be able in our virtuosity of decision-making to particularize our conclusions.

I mean that I want each of you to come away with specific courses of action in solution to specific problems that every one of you now faces with certain of your dealers. Therefore please bring with you a list of each of the shop owners in your territory and each of the shops. We may ask each Field Counsellor to review his list on the spot as we come upon a problem or proposed solution to see how it might apply to any shop in his territory.

Our usual tendency is to scan, mentally, the entire country or our own territory as we come upon a certain area of thought. This is what I would like to avoid this time. While the problem of dealer expansion and control is an abstract one, it is presenting real challenges to each of you. Let's see if we can leave the meeting with very real solutions to each of them. Prepare your lists carefully and clearly.

APPENDIX 2 1281

9 0155

the
MIDAS
field
counsellor

confidential memo from gordon sherman

December 10, 1959
MIDAS #59-1220

JOE PIERCE...

From all present indications, Joe Pierce's separation from the program is taking place without incident.

I am sorry that I did not give you more urgent instructions to review this entire case with your dealers even if they did not ask you to review it. My reaction to some of the reports that I now have is that many of you have neglected to review it and have left too much to chance and to the misinterpretation of others.

I did not mean, nor do I mean now, that you should race about your territories breathlessly and defensively explaining our position to everyone. I have conceived of it as possible that, in the normal course of your visits with every dealer, the elements of this case be reviewed as a matter worthy of attention so that you can at least be sure your dealers have received the word from you instead of from the "boys in the alley."

The active efforts to misinterpret our motives in this case have made many believe that Joe was cancelled without any provocation and without any notice. This should be clarified. Marc Vosk had attempted to work with Joe for one year. He had been repeatedly "stood up," sometimes to his greatest inconvenience, so that no relationship was possible even on the mere physical level of meeting with each other. Joe Pierce carried this to extremes when he promised to be at the last New York regional meeting and failed to show. Here he was even "standing up" his fellow dealers.

I am not asking you to treat this by reviewing every particular in a nervous list of offenses, and so I will not do so here. I have only tried to indicate that the respect and basic relationship with the Field Counsellor...and therefore with the program...were lacking, and that this constitutes one of the reasons why we took the action we did. We did our utmost to work with Joe Pierce during an entire year...His rejection of the program took place, in effect, long before our rejection of him.

In the United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1966, JANUARY SESSION, 1967

No. 15862 PERMA LIFE MUFFLERS, INC. *et al.*, *Plaintiffs-Appellants,* v. INTERNATIONAL PARTS CORPORATION *et al.*, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 25, 1967

Before MAJOR, *Senior Circuit Judge,* and SCHNACKENBERG and CUMMINGS, *Circuit Judges.*

MAJOR, *Senior Circuit Judge.* Plaintiffs brought this action in a three-count complaint for the recovery of damages allegedly sustained by reason of defendants' violation of the antitrust laws of the United States. They alleged in counts 1 and 2 that the terms of certain franchise agreements executed by the parties to govern their relationship in the purchase and sale of automotive exhaust systems parts through establishments displaying defendants' trade and service marks, "Midas" and "Midas Muffler Shop," illegally restricted plaintiffs in the operation of said shops. They alleged that the corporate and individual defendants joined in an illegal conspiracy to restrain trade, in violation of Sec. 1 of the Sherman Act (Sec. 1, Title 15 U.S.C.A.), and that they violated Sec.

3 of the Clayton Act (Sec. 14, Title 15 U.S.C.A.). They alleged in count 3 that the defendants violated Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act (Sec. 13, Title 15 U.S.C.A.), by granting discrimination in price and service to certain of their customers without offering or otherwise making available these same prices and services to plaintiffs.

The District Court, on a voluminous record and after numerous protracted hearings, sustained defendants' motion for summary judgment as to all counts. In its order entered May 24, 1966, from which the appeal comes, the Court held (1) that plaintiffs were in *pari delicto* and, therefore, without standing to complain about violations of Sec. 1 of the Sherman Act and Sec. 3 of the Clayton Act, and (2) that defendants' price and service discrimination did not constitute a violation of the Clayton Act, as amended by the Robinson-Patman Act.

Of the multiple plaintiffs, only four, Gregory Skarupa, Maxwell Ross, Joseph Pierce and Claude Wheeler, are here as appellants. Each of the plaintiffs, as well as others, was licensed under a franchise agreement with defendants to use the trade name, trademarks and service marks identified as "Midas" and "Midas Muffler Shops," in businesses which they operated in various states. Each plaintiff voluntarily entered into his first franchise agreement, and subsequently each sought and obtained franchises for additional shops.

The defendants were International Parts Corporation, three of its subsidiary corporations, plus six individual officers or agents of the corporate defendants. These ten separate legal persons constituted a single trading entity by which Nathan Sherman and his son, Gordon Sherman, conducted their family-owned business, including the sale of automobile exhaust systems.

In support of their motion for summary judgment, defendants presented to the District Court a 9-page detailed affidavit of the two Shermans, defendants and chief executive officers of the corporate defendants, and a 31-page appendix of excerpts from plaintiffs' depositions, answers to interrogatories or other record sources. Neither the affidavit nor the contents of the appendix

was challenged by the plaintiffs in the court below by counter-affidavits. Plaintiffs relied upon documentary proof, their deposition testimony and defendants' answers to interrogatories.

Judge Abraham L. Marovitz in a memorandum opinion, after a meticulous analysis of the factual situation and the case law, with reference to counts 1 and 2 stated:

> "It is clear from the undisputed facts before us that each plaintiff voluntarily entered into the franchise agreement at issue and accepted the benefits therefrom. They are, under the holdings in Rayco [234 F.Supp. 593] and Crest [246 F.Supp. 224] *in pari delicto* with defendants, and therefore unable to reap the harvest of their own misdeeds. Each plaintiff recognized that the franchise conveyed to him the right to use the various Midas trade names, trademarks and service marks, and each profited from the use of same. They are not now entitled to the high profit of a treble damage suit when they voluntarily acceded to, fostered, and profited from the very practice about which they now complain."

Subsequent to the entry of the judgment in the instant case, *Crest* was affirmed by this Court. *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896.

In allowing defendants' motion for summary judgment on count 3 of the complaint, the District Court concluded:

> "* * * that any alleged difference in price or service between purchases by plaintiff of Midas brand exhaust parts and purchases by other persons of Midas or International brand parts from defendant did not constitute a discrimination violative of the Robinson-Patman Act, in that (a) plaintiffs did not compete with other purchasers of Midas brand parts; (b) plaintiffs had the opportunity to purchase either brand; and (c) the Midas exhaust parts system was unlike the International system in grade and quality."

We think the Midas history, taken in the main from the unchallenged affidavits of Nathan and Gordon Sherman, is relevant. International Parts and the other defen-

dants composed the single business entity by which the Sherman family sold exhaust parts. Prior to the Midas franchise plan, which defendants originated in 1955, exhaust system parts were sold to consumers from innumerable retail outlets, such as garages and service stations. A muffler was merchandised like most other automotive replacement parts, was given no special attention, enjoyed no consumer brand consciousness and required a labor charge for installation. All of this was changed by the introduction of Midas, with its nationally advertised trade names, nationwide chain of specialized exhaust system shops, unique guarantee and free installation.

A network of franchised dealers, each of whom purchased directly from International Parts and owned a retail outlet identified by the various "Midas" trade names and service marks, invited the public to a nationwide chain of automotive shops specializing in exhaust system parts. The dingy surroundings of the typical auto repair shop were replaced by the Midas atmosphere of cleanliness, comfort and prompt, courteous service. The guarantee of a new Midas muffler free to replace any that wore out as long as the customer owned the car was to be honored in each shop no matter where the first muffler was purchased.

Success for this new merchandising concept, and for each Midas dealer, necessitated that the American motorist recognize the Midas name and have confidence that each dealer was an exhaust specialist who handled the same quality product, provided the same clean and comfortable surroundings, gave the same prompt and dependable service and honored the same unique Midas guarantee. Millions were spent by defendants and the Midas dealers on national and local advertising to publicize this Midas story.

A franchise agreement was tendered to each prospective dealer. It required no franchise fee, construction expense or purchase of capital equipment from defendants, and it was cancellable by either party on 30 days' notice. No lease of real estate or other equipment from Midas was required; the franchise was a contract for the purchase of Midas products for resale from a retail outlet licensed by defendants to use the trademark "Midas"

and the service mark "Midas Muffler Shop." Unlike the traditional auto repair shops that purchased through middlemen, the Midas dealers purchased at a significantly lower cost directly from International Parts.

A national association of Midas dealers and a monthly magazine allowed each dealer to learn about and profit from the experiences of his fellow dealers and to visualize better the national Midas image. Select dealers, including plaintiffs, who were most interested in this image and who had attained the greatest success, were members of a dealers' National Advisory Council. International Parts employees, called Midas field counselors, were used to assist the dealers.

After obtaining their first Midas franchise agreement most dealers, including plaintiffs, subsequently opened additional shops. Virtually every dealer, particularly plaintiffs, enjoyed substantial monetary gains from participation in the Midas program.

The gist of plaintiffs' argument appears to be embodied in the following statement taken from their brief:

> "Appellants operated under their agreements with appellees retailing and installing the Midas mufflers from 1955-56 to 1959-60. During this period appellees sold appellants the Midas muffler with its lifetime guarantee. In return appellees required appellants to retail the muffler at prices fixed by appellees and to honor muffler guarantees on presentation. Appellants were also required to deal exclusively with appellees. To purchase the Midas muffler, appellants were required to purchase all other exhaust parts items from appellees. At the same time appellees refused to sell appellants or permit them to handle the International muffler (which also carried a lifetime guarantee) or any automobile parts other than automotive exhaust systems parts. Moreover, appellees also refused to allow appellants to purchase from any of appellees' competitors."

So far as we are able to discern, no claim is or ever has been made by plaintiffs that any restriction was imposed by defendants other than those provided in the franchise agreements.

Plaintiffs in their reply brief, apparently in recognition of the damaging effect of the undisputed testimony of the great benefit and profits which they derived from the Midas program, narrow the issue considerably. They characterize defendants' argument in this respect as "spurious." The brief states:

> "The practices about which the appellants complain are appellees' exclusive dealing and resale price maintenance practices, and not, as appellees suggest, the program as a whole. Appellants were required to pay more for exhaust system parts which they purchased from the appellees than they would have paid had they been free to purchase these same parts from competitors of the appellees. This is the practice about which the appellants complain. It is difficult to imagine how appellants could have profited from such a practice."

Assuming there is any factual basis for this assertion, which is disputed, restrictions about which they complain were contained in the franchise agreement to which each of the plaintiffs solemnly subscribed.

The four plaintiffs operated in separate areas of the nation, were previously unacquainted with each other, and all participated in the Midas program in a similar manner. Each of the twenty shops operated by plaintiffs bore the name, "Midas Muffler Shop," and displayed Midas advertising material. National advertising by defendants covered plaintiffs' markets and was supplemented by plaintiffs' local advertising.[1] Each of the plaintiffs was at one time a member of the National Advisory Council. Plaintiffs Skarupa, Ross and Wheeler on 30 or 60 days' notice abandoned the Midas program, as permitted under the franchise agreement, and entered the Robin Hood program.[2] Pierce's franchise was terminated by Midas, on an agreeable basis, and he entered the Robin Hood program.

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[1] The national advertising expenditure by defendants from 1956 through 1960 was $3,570,424. Advertising was in numerous national magazines, as well as by radio and television programs. Much of the latter was done over stations in the areas in which plaintiffs operated.

[2] The Robin Hood franchise program was sponsored by a competitor of International Parts Corporation. Its dealers sold items other than exhaust systems and there was no manufacturer's guarantee on the featured muffler.

The deposition testimony of each of the plaintiffs is highly significant and, standing alone, completely refutes any notion that their participation in the Midas program was other than on a voluntary basis, or that they were coerced in pursuing a course which they now claim was illegal and for which damages are sought. A brief resumé of such testimony will suffice.

Skarupa in 1955, while employed by the Veterans Administration, sought defendants' guidance in opening a muffler shop in the Washington, D.C. area. He was so enthusiastic about the prospect that he organized Perma Life Mufflers, Inc., and on April 10, 1956, was granted his first Midas franchise. He testified, "I was interested in the Midas program provided I got assurances that the Washington metropolitan area would be assigned to me so that if I developed it I could reap the benefits of such development." Skarupa executed three more Midas franchise agreements within two years, and then terminated his four franchises because he could not obtain franchises for three more Midas shops he wanted to open. He mainly complained that he was limited in his further expansion in the Midas program. He wanted to monopolize and profit from every possible Midas shop in the Washington area. When defendants refused his request in this respect, he terminated his Midas franchise and joined the Robin Hood program. Skarupa's profit during the years he participated in the Midas program was $200,000. In the present action, he seeks an additional $800,000 in damages suffered as a result of the alleged ill treatment accorded him by defendants. He also seeks damages in the amount of $60,000 per year because of defendants' refusal to grant him three additional franchises.[3]

Ross became a highly paid executive of a profitable chain of four Midas shops in Michigan. He wanted the Midas image, the guarantee, the advertising and the quick service. He recognized that merchandising exhaust parts by national advertising was originated by Midas

[3] Skarupa's answer to Interrogatory II: "Plaintiffs were not permitted to satisfy the demand for additional muffler shops in the Washington Metropolitan Area. Had they been permitted to, plaintiffs would have opened three additional shops which would have had additional sales of approximately $100,000.00 per year each, or a total additional sales of approximately $300,000.00 per year. Net profit would have averaged 20% per year. Damages: $60,000.00 per year."

and that by his participation in the Midas system his business gained a valuable image of substance and credibility. To Ross, the franchise "meant that I thought that this was a good idea, I thought that it was a way of making some real money if I got into it quickly. * * * The thing that excited me was the guarantee * * *," and was "an avenue for sales and profit for me." He was so well satisfied with the program that he acquired two additional franchises for shops in Minneapolis for the reason, "Well, I had a good measure of success in the Muskegon and Grand Rapid areas. I liked the program. It was making money for me. I wanted to get in a larger metropolitan area, and Minnesota was open. I wanted not only the Minneapolis [area] but [also] St. Paul." He offered to construct a new building to house a Midas shop, if granted another franchise. He continued under the Midas program until offered what he thought was the less restrictive Robin Hood franchise, and then terminated his franchises with Midas.

Pierce was operating three muffler shops in upstate New York when he learned about the Midas program, for which he sought and was granted franchises. Within one year he obtained three more franchises, giving him a chain of six Midas outlets in five cities. He organized and did business under three corporate names, Muffler Sales and Service, Inc., Midas Muffler Sales and Service, Inc., and Pierce Muffler Shops, Inc. He was so well satisfied with the program that he attempted to obtain a franchise for a friend. Some controversy arose between Pierce and defendants, and his franchises were cancelled by defendants, without objection by Pierce.

Wheeler, located in the St. Louis area, learned of the Midas program through an advertisement and requested a franchise, which was granted. He sought more franchises so that he could preclude prospective Midas dealers from entering the St. Louis area. Within twelve months of opening his first shop, he had signed two more franchise agreements. Wheeler terminated his franchises and joined Robin Hood because defendants would not give him exclusive rights in the St. Louis area.

Plaintiffs' radio, television and newspaper advertisements demonstrate their participation in and cooperation

with the defendants in the programs of which they now complain. In the sake of brevity, we refer only to those by Skarupa which are typical of the advertising of all plaintiffs:

> "Member America's Only Coast-to-Coast Network of Exclusive Auto Muffler Shops."
>
> "* * * we're specialists in just one thing—your car's exhaust system * * *."
>
> "ANNOUNCING! The Newest Member of The Great National Network of Midas Muffler Shops."
>
> "Look for the MIDAS Sign—America's only coast-to-coast network of exclusive auto muffler shops."
>
> "* * * visit any one of Washington's three MIDAS MUFFLER SHOPS. Famous MIDAS mufflers come to you * * * installed FREE within fifteen minutes, while you watch * * * with a written guarantee from the factory for the lifetime of your car. It's a guarantee that follows you around the United States, to more than 200 cities bearing the MIDAS MUFFLER SHOPS sign * * *."
>
> "* * * MIDAS dual exhaust specialists will convert your present single exhaust system to a dual, in practically no time at all. You see, MIDAS exhaust experts perform in minutes the work ordinary garages and dealers take hours to do * * *."

After reviewing plaintiffs' testimony, the District Court stated, "Under no circumstances could 'coercion' be said to have been a factor herein." We think that conclusion is inescapable. Moreover, their testimony supports the Court's finding, "They voluntarily acceded to, fostered, and profited from the very practice about which they now complain."

In support of their argument that the *pari delicto* defense is not available to antitrust defendants, plaintiffs on brief rely heavily upon and discuss at great length *Simpson* v. *Union Oil Co. of California,* 377 U.S. 13, 84 S.Ct. 1051, reversing 311 F.2d 764. They argue that *Simpson* "is dispositive of the *pari delicto* issue in this

case." We have read and reread this opinion, and do not agree. The Court does not mention *pari delicto* and we think it did not intend to annihilate a principle so long embedded in the law.

It appears that the hard-core basis for the Court's decision resides in the fact that Union Oil was in a position by means of a lease to coerce Simpson to sell at prices fixed by Union Oil. Simpson was a retail dealer and leased from Union Oil the premises on which he did business. At the same time, he executed a consignment agreement with Union Oil. Both the lease and the agreement were terminable by either party at the end of any year, and the consignment agreement by its terms ended upon cancellation of the lease. As to this arrangement the Court stated (page 21):

> "By reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose non-competitive prices on thousands of persons whose prices otherwise might be competitive."

When Simpson refused to comply with the terms of the consignment agreement, Union Oil cancelled his lease. By this action Simpson was deprived not only of the right to purchase from Union Oil but simultaneously of a place to do business. The Court concluded its opinion by stating (page 24):

> "We intimate no views on any other issue; we hold only that resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws, and that petitioner suffered actionable wrong or damage."

Without restating the facts of the instant case, it is sufficient to note that they are a far cry from those considered by the Supreme Court in *Simpson*.[4]

Plaintiffs on brief argue that the decision here under attack is not only contrary to the decision of the Supreme

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[4] It is significant that *Simpson*, decided by the Supreme Court more than two years prior to our decision in *Crest*, was not relied upon, not even cited, by the parties in *Crest*, either in the District Court or in this Court. *Simpson* was also not relied upon by either party in *Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Association*, 371 F.2d 263, 267, in which we reaffirmed the *Crest* rule.

Court in *Simpson* "but also contrary to the substantial weight of authority." We think the weight of authority is in the opposite direction. However, we see no point in citing or discussing plaintiffs' cases on this score inasmuch as in our recent decision in *Crest* (360 F.2d 896) we considered the same contention and in the main the same cases as are relied on here. In *Crest* we stated (page 900):

> "Plaintiffs refer to a 'feeling' in 'all the Courts' against the pari delicto rule in private anti-trust cases. The only animus we detect in the courts on the pari delicto question is directed at protecting those who are coerced into illegal agreements * * * [citing cases], or at permitting suits where the defense is the unclean hands of a plaintiff in transactions other than the one in suit, as the Supreme Court held in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 214, 71 S.Ct. 259, 95 L.Ed. 219 (1951). But where a plaintiff participates freely in the alleged anti-trust conduct, the pari delicto rule precludes recovery. [Citing many cases.] As Judge Soper said in Pennsylvania Water, 209 F.2d at 134, the doctrine that a plaintiff who is a voluntary party to the allegedly illegal agreement which forms the basis for the anti-trust suit cannot recover thereon was 'firmly established in earlier cases,' and still remains to be given effect in appropriate actions."

Plaintiffs on brief assert that the *Pennsylvania Water* decision cited and quoted from by this Court in *Crest* "was inferentially overruled" by the same Circuit in its subsequent decision in *Osborn v. Sinclair Refining Co.,* 286 F.2d 832, cert. denied 366 U.S. 963. We think in this plaintiffs are mistaken. In *Osborn,* there was no written franchise contract agreement or other form of arrangement by which the plaintiff obligated himself to be bound. More than that, the Court found that the grievance of which plaintiff complained was the result of coercion. No *pari delicto* defense was involved and, obviously, the Court did not overrule its previous decision in *Pennsylvania Water.*

Plaintiffs' reliance upon *Bales et al. v. The Kansas City Star Company et al.,* 336 F.2d 439, is even more

pointedly misplaced. In that case the Eighth Circuit, in a decision rendered five months after that of the Supreme Court in *Simpson* v. *Union Oil Co.*, 377 U.S. 13, gave recognition to the doctrine of *pari delicto* as a defense. The Court stated (page 444):

> "Of course, if the plaintiffs actually were in pari delicto with the defendants in the alleged endeavor of the Star to prevent competition and create a monopoly for itself in the area, the law should leave them where it finds them. But if they accepted the contract restriction only in business necessity and not in any sanction or furtherance of a trust endeavor by the Star, they would not be in pari delicto for purposes of the right to recover for such provable injury to their businesses as the Star's antitrust violation had occasioned." (Citing numerous cases, most of which we cited in Crest.)

In resumé, each plaintiff initially asked to become a participant in the Midas merchandising program and voluntarily, willingly and knowingly executed his first Midas franchise agreement. Each plaintiff thereafter eagerly sought additional shops in the Midas program and voluntarily executed additional franchise agreements for such shops. Each plaintiff at all times had the legal right to abandon the Midas program and to cancel these franchise agreements on 30 days' written notice. Three of the instant plaintiffs unilaterally terminated their franchises when it suited their convenience and the fourth acquiesced in the termination of his franchise. Furthermore, each plaintiff cooperated with defendants and all other Midas dealers in the conduct which plaintiffs now assert was illegal and injurious to their business and property. Each plaintiff accepted the benefits arising out of the franchise agreements and earned substantial and significant profits during the terms of such agreements. Each plaintiff sought to perpetuate the "wrong" of which he now complains by acquiring additional franchises, and Skarupa makes the contradictory claim that he is entitled to damages not only because of the "wrong" he suffered while a party to and operating under franchise agreements but also because additional franchises which he sought were denied. Presumably, he was so well

satisfied with the ill treatment which defendants assertedly imposed upon him that he sought the opportunity to suffer more of the same treatment."

It would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine. We hold that it was properly applied and given effect by the District Court.

The District Court further held as an alternative basis for the dismissal of count 1 of the complaint that no conspiracy existed as a matter of law. The Court found that the corporate and individual defendants were a single business entity through which a family business was operated. Based on this factual premise, with which plaintiffs take no issue, the Court, citing *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911, 914, held as a matter of law that no conspiracy as alleged in the complaint existed. At the same time the Court recognized, "While we agree with plaintiff that subsidiary corporations may under certain circumstances 'conspire' to violate the antitrust laws, the record before us indicates by uncontested facts that no such conspiracy was present here."

Plaintiffs in support of their argument on this point rely upon *Kiefer-Stewart Co. v. Seagram & Sons, Inc. et al.*, 340 U.S. 211, which they claim involved the same type of conspiracy as that alleged here. In that case, while it appears there was common ownership and control of the corporate defendants, there was no finding such as we have where all the defendants were acting as a single business entity. As the District Court stated:

> "There is no evidence, except in plaintiffs' unsupported arguments that these corporations competed with each other or acted in any manner other than as a single integrated business. There are no acts alleged which could not have been done by a single corporation acting alone. Plaintiffs may not by mere pleading allegations and conclusions fragmentize a unified business to meet the conspiracy requirements of the Sherman Act."

We agree with the reasoning and hold that count 1 was properly dismissed on this alternative basis.

Defendants argue as a further defense that the Midas franchise agreements, and the merchandising methods employed by plaintiffs, defendants and the other Midas dealers in connection therewith, were reasonable and legal means to protect the various Midas trade names, trademarks and service marks licensed to plaintiffs by such franchise agreements, and that such agreements and merchandising methods were not prohibited by the Sherman or Clayton Acts. As plaintiffs point out, at one stage of the proceedings this defense was on their motion stricken. Defendants contend that subsequently the defense was reinstated and may be relied upon here. On this score the record abounds with confusion. One thing, however, emerges with certainty, that is, that the District Court did not rule on the merits of this defense and, therefore, did not rely upon it in allowing defendants' motion for summary judgment on counts 1 and 2. In view of our agreement with the District Court as to the other grounds upon which the motion for summary judgment was allowed, we, like that Court, find no occasion to decide defendants' contention in this respect.

We now come to count 3, which charges defendants with the violation of Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act (Sec. 13, Title 15 U.S.C.A.), by price and service discrimination against plaintiffs and in favor of other customers.

Defendants' motion for summary judgment as to this count stated:

> "Any difference in price or service, as alleged in Count Three, between purchases by plaintiffs of Midas brand exhaust parts and purchases by other persons of Midas brand exhaust parts or International brand exhaust parts from defendants did not constitute a discrimination, in that:
>
> (a) Plaintiffs did not compete with other purchasers of Midas brand exhaust parts;
>
> (b) Plaintiffs had the ability and opportunity to purchase Midas brand exhaust parts or to purchase International brand exhaust parts;
>
> (c) Retailers' and consumers' preference for the Midas brand exhaust parts system as a premium

commodity, its inseparable and distinct guarantee, and its different metallic properties made it unlike in grade and quality to the International brand exhaust system."

The District Court at the time it allowed summary judgment as to counts 1 and 2 denied such judgment as to count 3, without prejudice to the right of plaintiffs to obtain defendants' answers to certain interrogatories which they had proposed. After defendants had supplied the information thus sought, the Court allowed summary judgment as to this count.

We reach the conclusion that the allowance of summary judgment as to count 3 was improper. In doing so, we see no point in citing or discussing the numerous cases called to our attention. It is sufficient to refer to two recent decisions of this Court, cited and relied upon by defendants. *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896; *Markwell* v. *General Tire and Rubber Co.*, 367 F.2d 748. In both cases summary judgments were affirmed. In *Crest,* as previously shown, the situation was similar to that here. In that case we affirmed summary judgment as to counts 1 and 2, based on the *pari delicto* defense. We affirmed summary judgment as to count 3, in the main for the reason that the complaint failed to allege that the practice complained of had any effect on competition. We also held that the affidavit filed in support of the motion was not controverted by counter-affidavit and there was thus no issue of material fact.

In *Markwell,* we sustained summary judgment on the premise that affidavits filed by the plaintiff in response to the motion for summary judgment failed to contradict those filed in support of the motion. In doing so we stated (page 750):

> "As the Supreme Court's Advisory Committee stated, Rule 56 (e) was amended to require a party opposing a motion for summary judgment, supported by affidavits, to produce enough evidentiary matter to establish a genuine issue for trial, for the 'very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'"

The situation in the instant case is far different. The sole affidavit offered by defendants in support of summary judgment was, as previously noted, that of Nathan and Gordon Sherman. While this affidavit was pertinent to the defense of *pari delicto* interposed as to counts 1 and 2, it bears no relevancy to the count under consideration. It neither denies nor offers any explanation as to the discriminatory practices alleged in count 3. Obviously, it required no counter-affidavit. More than that, the voluminous record here contains deposition testimony, answers to interrogatories and much documentary evidence, from which we think clearly emerge genuine issues for trial.

The District Court held that there was no intra-brand discrimination, that is, sale of Midas parts to other Midas dealers at prices lower than those charged plaintiffs, on the ground that such parties were not in competition. However, the Court's finding that there was no competition among such dealers is based solely upon plaintiffs' deposition testimony "that the geographic 'marketing area' in which they sold Midas products was the 'city or county' in which each shop was located, and that no other Midas dealer was located within that region of competition." This geographical situation, while a factor to be considered, in our view does not eliminate the issue as to whether there was or might have been competition. Customers of Midas dealers might be located in areas between dealers and willing to patronize any of them.

More important, the Court embraced defendants' contention that there was no legal discrimination against plaintiffs because they had the ability and opportunity to purchase either Midas brand exhaust parts or International brand exhaust parts (inter-brand). Relative thereto, the Court found:

> "* * * that plaintiffs, well aware of any price differentials that might exist between the two brands, having dealt with International previously, and in one instance having continued to do so, *freely* chose to forego purchases of International parts and to deal exclusively with Midas. * * * The evidence is uncontroverted in demonstrating that plaintiffs were

free to purchase either product, but chose Midas. No discrimination in a legal sense is present, and defendants are entitled to summary judgment."

We think this finding confuses the issue presented by count 3 with that which we have previously considered relative to counts 1 and 2. True, plaintiffs by their franchise agreement "*freely* chose to forego purchases of International parts and to deal exclusively with Midas." Thus, under the *pari delicto* doctrine, as we have held, they were precluded from complaining on that score. However, the fact that they were required to purchase from Midas at a price determined by it does not absolve Midas from the charge that it or International granted discriminations in prices and services to certain of their customers, without offering or otherwise making those same or similar services available to plaintiffs, as charged in count 3.

We think the finding, "The evidence is uncontroverted in demonstrating that plaintiffs were free to purchase either product, but chose Midas," is erroneous. Plaintiffs' freedom in this respect was forfeited by the terms of the franchise agreements. The record contains much evidence that there was a continuing effort on the part of Midas to enforce the exclusive dealer requirement.

A few excerpts from the record are sufficient to demonstrate at least that there was an issue as to whether plaintiffs were free to handle any product other than that purchased from Midas. On July 1, 1957, Gordon Sherman advised his "field counselors":

> "THE MOST SACRED PRINCIPLE OF THE MIDAS PROGRAM IS THAT ALL MIDAS SHOPS ARE MUFFLER SPECIALISTS, AND NO SIDE LINES ARE PERMITTED IN SHOPS THAT IDENTIFY THEMSELVES WITH THE MIDAS PROGRAM.
>
> * * *
>
> "* * * any merchandise not carrying the Midas brand. Our policy in this matter is simply one of requiring that those people who are part of the program are part of it all the way. * * * See to it that it is enforced and tell us where it isn't."

On March 31, 1958, Sherman in a memorandum to all "field counselors" stated in part:

"We now require that all Midas Muffler Shops purchase their Hollywood mufflers from Midas exclusively. This is somewhat overdue since the convention last year, and we have long since prepared our dealers to accept this line as part of their overall participation in the Midas program. Take it from there."

On March 25, 1959, Sherman advised his "field counselors" that the home office had "studied each and every Midas order" as it was processed for shipment in order to "isolate" those dealers who were not purchasing "tail pipes" from defendants. In this memorandum Sherman reiterated defendants' exclusive dealing policy, stating:

"When a dealer signs a franchise with us he commits himself undeniably to certain basic practices in our program. Paramount among these is his consistent and exclusive purchase of our products. Our dealers have become so dedicated to our mufflers that I believe there is no question on this, but it is possible that some of them regard our tail pipes and our clamps as a kind of afterthought to which 'loyalty' does not apply. You have all been aware of this as you also have been aware of certain tail pipe companies who manufacture short lines of easily produced numbers at discount prices."

The deposition testimony of plaintiffs as well as their answers to interrogatories likewise raise an issue as to their freedom to purchase products other than Midas. Typical is the testimony of Skarupa as to a conversation with a "field counselor":

"Q. Do you recall the substance of that conversation?

A. Well, I had pointed out to him that I could buy pipes cheaper if I bought through Texas Tailpipe. I could save a considerable amount of money. I could save a considerable amount of money in the year's purchase.

Q. What was his reply?

A. Well, he explained to me that I should know by now that I wouldn't be able to purchase from outside sources because of the fact that I would get my franchise cancelled and he explained to me that others had their franchise cancelled from the purchase of outside products."

Further in response to defendants' motion for summary judgment, the District Court stated;

"Finally, we are convinced that the Midas parts were sufficiently dissimilar in grade and quality from International products so as to justify a price differential under the terms of Section 2 (a)."

In our view, this is another issue which cannot properly be determined on a motion for summary judgment. Certainly the Court's reference to "Midas parts" could not refer to items other than mufflers. There is evidence that tail pipes, exhaust pipes, clamps and other items sold by Midas were indistinguishable from similar items sold by International and by other parties. In fact, Gordon Sherman in his deposition admitted that exhaust pipes, tail pipes and clamps sold by Midas did not bear a trademark or trade name. Defendant Schroeder on interrogatory admitted as much:

"Q. Was the Midas name placed on any of these items by putting the item in a box with a Midas name on it or by attaching a tag with a piece of wire or string during any of the period 1955 through and including 1960?

A. Not to my knowledge."

Plaintiff Ross on deposition testified:

"We could see no purpose, really, in buying pipes of that kind from Midas. There was no quantity discount. There was no freight allowance except the freight allowance when we shipped in larger quantity. Then we got a lower rate.

"There was no insignia on the pipe. Certainly we wouldn't be confusing anybody by selling a pipe from Texas rather than a pipe sold to us by Midas."

Plaintiff Skarupa testified:

"A. I don't think we can ascribe the word 'Midas' to the tail pipes because they weren't identified as such and people didn't come in asking for Midas tailpipes. There was no guaranty on the tailpipes.

Q. They were not identified as 'Midas' on the boxes were they not?

A. No sir.

Q. They were not?

A. Sir?

Q. They were not?

A. Midas tailpipes were not identified as Midas tailpipes, as you are stating it.

Q. On the boxes in which they were shipped?

A. The tailpipes didn't come in boxes; they came in bundles.

Q. There was no identification of 'Midas' or anything on the bundles?

A. A packing slip which was tied with wire, but that wasn't affixed to the tailpipes."

The District Court further stated:

"In addition to an undisputed physical difference existing between the two mufflers after January 1, 1959, the uncontroverted facts clearly reveal that the Midas product included in its purchase price a unique lifetime guarantee by the manufacturer, not attached to the International commodity. Such a guarantee, in the opinion of this Court, clearly justifies a differential in price, and with equal clarity, constitutes a dissimilarity in grade and quality."

This reasoning in part is beside the point. The physical difference in the two mufflers, after January 1, 1959, is immaterial. Plaintiffs on brief make this clear. They state:

"After January 1, 1959, International Parts changed the gauge of steel used in the manufacture of the Midas muffler. Appellees used this change to justify the differential in their guarantee. Appellants' claim, however, is not based on the post-1959 muffler; rather, appellants' claim is based solely on the pre-1959 mufflers which were returned after January 1, 1959, and

> which were identical to mufflers returned by their competitors who received a rebate of 100%; appellants received a rebate of only 50%."

There is evidence that there was no physical difference between the mufflers sold by International and those sold by Midas, except for the identification brand, for the years 1955 to 1959, inclusive. This was admitted in the deposition testimony of defendant Schroeder.

It is undisputed, as the District Court points out, that the Midas muffler carried a guarantee good at any Midas muffler dealer wherever located, while the International muffler carried a guarantee good only where purchased. We do not agree, however, that this difference constitutes a "dissimilarity in grade and quality" or that it justifies a difference in price.

We think the rationale employed in *Federal Trade Commission* v. *Borden Co.*, 383 U.S. 637, is applicable. The Court held, as stated in a headnote (page 637):

> "Labels do not differentiate products for the purpose of determining grade or quality under Sec. 2 (a) of the Act, even though one label may have more customer appeal and command a higher price in the marketplace."

Paraphrasing this language, the Midas trade name or trademark does not differentiate its mufflers for the purpose of determining grade or quality, even though its guarantee may have more customer appeal and command a higher price in the marketplace.

Nothing we have said is to be taken as a resolution of any issue of fact. Our sketchy review of the evidence is only for the purpose of showing that there are genuine issues of fact which preclude the disposition of count 3 by summary judgment.

The summary judgment as it relates to counts 1 and 2 of the complaint is affirmed. The summary judgment as to count 3 is reversed and the cause therein stated is remanded for further proceedings.

AFFIRMED IN PART AND REVERSED IN PART.

CUMMINGS, *Circuit Judge* (dissenting in part). I agree with the majority that *Crest Auto Supplies, Inc. v. Ero Manufacturing Company*, 360 F.2d 896 (7th Cir. 1966) supports the *in pari delicto* defense to Counts 1 and 2. However, an examination of the briefs filed in *Crest* reveals that *Simpson v. Union Oil Co.*, 377 U.S. 13, was not cited to this Court. A close study of the *Simpson* case, including the briefs filed therein, convinces me that the Supreme Court would not accept the *in pari delicto* defense here. As with these plaintiffs, Simpson had freedom of choice "to accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts." He "deliberately and knowingly enter[ed] into [the] contractual obligations" (311 F.2d 764, 768, 769). In *Simpson*, the Ninth Circuit used the *in pari delicto* theory to deny him any recovery. That point was fully briefed in the Supreme Court, which reversed, permitting Simpson to prevail. Therefore, I am forced to conclude that the Supreme Court rejected the *in pari delicto* defense. Judge McLean came to the same conclusion in *Lyons v. Westinghouse Electric Corporation*, 235 F.Supp. 526, 537 (S.D.N.Y. 1964), stating:

> "It may be noted that under Simpson v. Union Oil Co., supra, the fact that plaintiffs voluntarily entered into an illegal contract does not in itself bar their recovery. The contract, if illegal, is still an actionable wrong."[1]

In *Simpson*, even Mr. Justice Stewart's dissent agreed that the *in pari delicto* reasoning of the Ninth Circuit was "untenable" (377 U.S. at p. 25). As in *Simpson*, these defendants had the coercive power to terminate plaintiffs'

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[1] Professor Day interprets the *Simpson* case in accordance with Judge McLean's opinion. See 25 ABA Antitrust Section 240 (1964). Other cases disapproving the *in pari delicto* defense in certain situations include *Waldron v. British Petroleum Co.*, 231 F.Supp. 72, 91-92 (S.D.N.Y. 1964) and *Mason City Tent & Awning Company v. Clapper*, 144 F.Supp. 754, 769-770 (W.D.Mo. 1956). With respect to *Bales v. Kansas City Star Co.*, 336 F.2d 439, 444 (8th Cir. 1964), discussed at pp. 11-12, *supra*, these plaintiffs also seem to have "accepted the contract restriction only in business necessity" and not in an effort to help Midas violate the antitrust laws, so that the *in pari delicto* defense would be inapplicable to them under *Bales*. Cf. *Englander Motors, Inc. v. Ford Motor Company*, 267 F.2d 11 (6th Cir. 1959); *Alles Corporation v. Senco Products, Inc.*, 329 F.2d 567 (6th Cir. 1964).

franchises if plaintiffs did not adhere to the resale price maintenance and exclusive dealing provisions. These plaintiffs wished to buy various parts (tailpipes, clamps, etc.) from competitors of Midas who were selling at lower prices than Midas. If they had been permitted to purchase at these lower prices, they would have been able to lower their prices, as did Simpson.

As stated in *Simpson* (377 U.S. at pp. 16, 17, 18):

> "The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws.
>
> * * *
>
> "The exclusive requirements contracts struck down in *Standard Oil Co.* v. *United States*, 337 U.S. 293, were not saved because dealers need not have agreed to them, but could have gone elsewhere.
>
> * * *
>
> "The interests of the Government also frequently override agreements that private parties make. Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment [here a franchise agreement], no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy. * * * Nor does § 1 of the Sherman Act tolerate agreements for resale price maintenance."

The public policy justifying the denial of an *in pari delicto* defense in a case of this sort was stated as follows with reference to the unclean hands defense raised in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214:

> "If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents

nor immunize them against liability to those they injured."[2]

With respect to the majority's alternative basis discussed at p. 13 *supra,* this record shows that Midas and International held themselves out as separate and "divorced". Therefore, *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, does not permit defendants to claim that as a single business entity they were unable to conspire. Furthermore, under *Simpson* v. *Union Oil Co.,* 377 U.S. 13, and *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, a conspiracy is not needed to support Count 1.

As to the muffler part of Count 3, defendants have not cited any authorities or legislative history to show that the difference in the Midas and International guarantees makes these physically identical mufflers[3] dissimilar in grade and quality within the meaning of Section 2(a) of the Robinson-Patman Act. Cf. *Federal Trade Commission* v. *Borden Co.,* 383 U.S. 637, with the District Court's opinion herein (1966 CCH Trade Cases at p. 82,710). Therefore, affirmance on this point is not justified.

Except as indicated, I concur in the opinion of the Court.

A true Copy:

Teste:

....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[2] See also *Budget Dress Corp.* v. *International Ladies' Garment Workers' Union,* 25 FRD 506, 508, 509 (S.D.N.Y. 1959); *Trebuhs Realty Co.* v. *News Syndicate Co.,* 107 F.Supp. 595, 599 (S.D.N.Y. 1952).

[3] A different gauge of steel was used in the Midas muffler after January 1, 1959, but plaintiffs have limited their claim to pre-1959 mufflers.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 733

PERMA LIFE MUFFLERS, INC.
PERMA LIFE MUFFLERS OF ARLINGTON, INC.
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.
PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.
ROBIN HOOD OF GRAND RAPIDS, INC.
ROBIN HOOD OF MUSKEGON, INC.
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a
ROBIN HOOD MUFFLER SHOP
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a
MIDAS MUFFLER SHOP OF BATTLE CREEK
CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS
PIERCE MUFFLER SHOPS, INC.

APPELLANTS

v.

INTERNATIONAL PARTS CORPORATION
MIDAS, INC.
POWELL MUFFLER CO. INC.
MUFFLER CORPORATION OF AMERICA
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,
ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

APPELLEES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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MUFFLER CORPORATION OF AMERICA
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,
ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

APPELLEES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled case[1] [Appendix A].

[1] The judgment affirmed dismissal of two of three counts of a treble-damage complaint under Section 4 of the Clayton Act (15 U.S.C. 15). Dismissal of the third count, a claim for damages as a result of alleged violations of the Robinson-Patman amendments to the Clayton Act (15 U.S.C. 13), was reversed and remanded to the trial court [Appendix A]. This petition is limited to a request to review the ruling of the Court below with respect to the first two

[Footnote continued]

CITATIONS TO OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Illinois, Eastern Division, which entered summary judgment against petitioners, are reported at paragraphs 71,801 and 71,802 in CCH 1966 Trade Cases and appear in the Appellants' Appendix at 7 et seq. and 14 et seq.

The opinion of the United States Court of Appeals for the Seventh Circuit which affirmed in part and reversed in part the judgment of the District Court is reported at __ F.2d __ and appears herein as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 25, 1967. A petition for rehearing en banc was denied on June 7, 1967 [Appendix C]. On August 30, 1967 the Court entered an order extending time to file Petition for a Writ of Certiorari to and including October 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Without trial, may a Federal Court immunize a major national franchisor from treble-damage liability to its franchisees under Section 4 of the Clayton Act (15 U.S.C. 15) on the sole ground that the franchisees are *in pari delicto* with the franchisor as a result of having executed the franchisor's standard form franchise agreement which the franchisor offered them as the only basis on which it would do business, where the franchisor, through coercive threats of franchise termination, compelled its franchisees to comply with provisions in its franchise agreement which required franchisees to,

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[Footnote 1 continued]
counts: claims alleging violations of Section 1 of the Sherman Act, 15 U.S.C. 1 [Count I], and Section 3 of the Clayton Act, 15 U.S.C. 14 [Count II].

(a) deal exclusively with the franchisor as a supplier of all goods offered for sale by the franchisees; and

(b) purchase non-trademarked "tied products" from the franchisor as a condition of purchasing the franchisor's trademarked and nationally advertised "tying product"; and

(c) sell all products at prices fixed by the franchisor?

2. Does an ousted franchisee have a cause of action against his franchisor under Section 4 of the Clayton Act for damages resulting from termination of his franchise agreement by the franchisor because of the ousted franchisee's refusal to comply with the exclusive dealing provisions in the franchisor's standard form franchise agreement?

3. Does the franchise method of distribution of a major national franchisor which (1) enforces requirements in its standard form agreements that (a) franchisees deal exclusively with the franchisor, and (b) purchase tied products from the franchisor; which (2) restricts the franchisees' right to establish the price at which they sell merchandise which they have purchased; and which (3) limits the persons to whom franchisees can sell merchandise which they have purchased, constitute a violation of Section 1 of the Sherman Act and/or Section 3 of the Clayton Act?

4. Is proof of a conspiracy essential to state a cause of action under Section 1 of the Sherman Act, 15 U.S.C. 1, or is proof of an agreement in restraint of trade by itself, without proof of a conspiracy, sufficient to state a cause of action under Section 1 of the Sherman Act, 15 U.S.C. 1?

STATUTES INVOLVED

The Statutes involved are Section 1 of the Sherman Act, 15 U.S.C. 1; Section 3 of the Clayton Act, 15 U.S.C. 14; and Section 4 of the Clayton Act, 15 U.S.C. 15. These are printed herein as Appendix D.

STATEMENT OF CASE

Plaintiffs entered into standard-form preprinted franchise agreements with the defendant Midas (in 1955-56) to obtain the right to purchase and sell defendants' MIDAS muffler. These franchise agreements, which were drafted by the defendants, were offered to plaintiffs and other franchisees as the only basis on which defendants would sell their MIDAS muffler. The agreements encompassed an aggregation of trade restraints which severely circumscribed the economic freedom of franchisees. The agreements (1) prohibited plaintiffs from purchasing and reselling any products other than those purchased from defendants [AA 54];[2] (2) required plaintiffs to retail trademarked and non-trademarked products which they had previously purchased from defendants at prices fixed in price lists supplied by defendants [AA 56]; (3) prohibited sales by the plaintiffs for further resale; and (4) prohibited sales outside areas designated in the franchise [AA 51]. Each agreement was terminable with or without cause on thirty (30) days' written notice by either party [AA 58].

Plaintiffs operated under these agreements until 1959-60. During this period they were compelled to adhere to each and every one of the provisions in the defendants' franchise agreement. To retain their franchise to sell the MIDAS muffler they were required to purchase other non-trademarked exhaust system parts from the defendants [AA 24-25, 26, 27, 28, 30, 31, 34, 35, 39-40, 41-42, 65, 71-72, 78, 79-80, 83, 84, 88], and to sell trademarked and non-trademarked parts at prices fixed by defendants [AA 26, 56, 68, 74, 77, 87-88; R 1303]. Defendants refused to sell to the plaintiffs or to permit them to handle any automo-

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[2] As used herein "AA" means Appellants' Appendix in the United States Court of Appeals for the Seventh Circuit; "R" means the Record of the case as certified to the Court of Appeals by the United States District Court for the Northern District of Illinois, Eastern Division.

tive parts other than exhaust system parts [AA 29, 30, 38, 40, 63-64, 70, 71-72, 76, 79, 89], and refused to allow plaintiffs to sell for resale [AA 26, 73] or to sell outside areas designated in the franchise agreement. Defendants refused to permit plaintiffs to purchase non-trademarked exhaust system parts from defendants' competitors, even though some competitors offered such parts for sale at prices substantially below the prices at which defendants sold these parts to the plaintiffs [AA 27, 28, 30, 31, 32, 34, 35, 39-40, 41-42, 65, 70, 76, 80, 84, 85, 91-94].

Through salesmen who inspected plaintiffs' premises [see, e.g., AA 24-25, 88] and through requirements for periodic financial reports and analyses of dealer orders [AA 24-25, 36], defendants maintained a close surveillance of the operations of these plaintiffs and other franchisees to assure compliance with the terms of their franchise agreements, particularly the exclusive dealing and price-fixing provisions [see, e.g., AA 27-28, 31-32, 88]. Defendants' officers and salesmen continually warned plaintiffs (as well as other franchisees) that any violations of the provisions in the franchise agreement could lead to franchise termination [AA 64-65, 73]. Defendants climaxed a series of threats of franchise termination to one of the plaintiffs (Pierce), if he refused to discontinue purchasing from defendants' competitors, by unilaterally terminating that plaintiff's franchise agreement [AA 22, 25, 33-34, 65]. Subsequently other plaintiffs terminated their franchises to avoid continuing to pay the higher price for non-trademarked exhaust system parts which defendants demanded and received because of their exclusive dealing requirements.[3]

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[3] The basic unfairness of the defendants' franchise plan was magnified in 1959 when defendants reneged on their original promise to underwrite the complete cost of their guarantee on their Midas muffler. To induce franchisees to accept their franchise agreement defendants offered a muffler guarantee good at any Midas franchisee in the nation. Defendants promised to reimburse franchisees 100% of their product cost for these replacements, i.e., to bear the full cost

[footnote continued]

This three-count private antitrust action followed in August of 1960, alleging violations of Section 1 of the Sherman Act, 15 U.S.C. 1 [Count I], Section 3 of the Clayton Act, 15 U.S.C. 14 [Count II], and Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13 [Count III].[4] At that time defendants were directing the ~~activ-~~ activities of some 260 dealers operating more than 350 MIDAS Muffler shops in 42 states. The defendants' uniform, preprinted franchises for all of these shops required exclusive dealing as well as resale price maintenance and provided for other unlawful restrictions as a condition of doing business with defendants and purchasing defendants' MIDAS mufflers. Through the use of such agreements, defendants between 1955 and 1960 trebled their business volume to more than $17,000,000 annually. Defendants were the nation's fifth-largest distributors of automotive exhaust parts for the replacement market.[5]

[footnote 3 continued]

of their guarantee program except for labor (with respect to which franchisees were free to make a service charge). In 1959, defendants unilaterally reduced this to a 50% obligation. Franchisees purchased replacements under defendants' guarantee at 50% of cost. This charge equalled (approximately) defendants' cost of production.

Plaintiffs were financially unable to pay higher prices for non-trademarked exhaust system parts and at the same time also defray the real costs of defendants' guarantee program.

[4]The Robinson-Patman claim [Count III, 15 U.S.C. 13] alleged discriminations with reference to discounts and the terms on which defendants offered automotive exhaust parts for sale. Summary judgment for defendants was reversed on this claim which was remanded to the District Court. See footnote 1, supra; infra at 7; footnote 15, infra.

[5]*United States v. A. P. Parts Co.*, CCH Trade Cases 1964, ¶ 71,255. In the 1960 complaint filed by the Department of Justice in that case, defendants here were described as the fifth-largest distributor of exhaust system parts for the replacement market in the United States with approximately 11% of the market. See also *United States v. Maremont Automotive*, CCH Trade Cases 1960, ¶ 69,881.

Just prior to trial, after all discovery had been closed, defendants moved for summary judgment contending that plaintiffs were *in pari delicto* with the defendants. The District Court sustained this defense and granted defendants' motion holding that since plaintiffs had "solemnly subscribed" to defendants' franchise agreement they were ipso facto without standing to sue under Section 4 of the Clayton Act. The United States Court of Appeals for the Seventh Circuit, with one of three judges dissenting, affirmed dismissal of Counts I and II, but reversed dismissal of Count III and remanded that Count for trial.[6]

A petition for rehearing *en banc* was denied with two judges dissenting.

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[6] Plaintiffs' major claims for damage arise under Counts I and II which constituted continuing practices during the entire franchise period of 1955 to 1960. Plaintiffs' damages under Count III, though substantial, relate to Robinson-Patman discriminations which occurred primarily during the period 1959-60. Count III damages are distinctly different from and independent of damages claimed under Counts I and II.

REASONS FOR GRANTING THE WRIT

I

The Court Below Decided a Significant Question of Federal Law in Direct Conflict With *Simpson v. Union Oil Co. of California* and Other Decisions of This Court Which Hold That "in Pari Delicto" Does Not Bar an Action Under Section 4 of the Clayton Act.

Even though the record showed that plaintiffs suffered the impact[7] of practices condemned[8] by Section 1 of the Sherman Act (15 U.S.C. 1) and Section 3 of the Clayton Act (15 U.S.C. 14), the Court below held that plaintiffs barred themselves from bringing an action under Section 4 of the Clayton Act (15 U.S.C. 15) by "accept[ing]" the defendants' franchise agreement. The majority of a divided court ruled that since plaintiffs had in the first instance

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[7] Plaintiffs were required to pay more for non-trademarked exhaust system parts which they purchased from the defendants than they would have paid had they purchased them from defendants' competitors. Defendants admitted as much in memoranda to their salesmen declaring that some competitors "make a small assortment of popular numbers and distribute them at unjustifiably low prices" [AA 31]; or that ". . . certain tail pipe companies manufacture short lines of easily produced numbers at discount prices" [AA 24].

Price comparisons in the record demonstrate the fact of plaintiffs' damage [AA 91-94]. *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 471 (C.A. 9, 1964); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 840 (C.A. 4, 1960). Had plaintiffs purchased tailpipes, by way of example, from defendants' competitors they would have effected savings in the area of 24% off the cost of these items from the defendants. Defendants' prices for these items were approximately 33% more than the prices charged by some of the defendants' competitors. [AA 91-94].

[8] Infra, footnote 10.

"solemnly subscribed"[9] to defendants' franchise agreements, provisions of which required them to (1) deal exclusively with defendants, (2) buy non-trademarked exhaust system parts as a condition of buying the defendants' MIDAS muffler, and (3) sell trademarked and non-trademarked products at prices fixed by defendants,[10] plaintiffs could not complain thereafter and had no standing to sue even though the record showed that these provisions were enforced through coercive threats of franchise termination.[11] This holding runs counter to this Court's interpretation of Sec-

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[9] Appendix B at 6. Plaintiffs' Sherman Act claim was dismissed on the alternative ground that plaintiffs had failed to prove conspiracy.

[10] These restraints are among the type which the Courts have consistently condemned as violative of Section 1 of the Sherman Act: *Standard Oil of California v. United States*, 337 U.S. 293, 69 S.Ct. 1051 (1949); *Anchor Serum v. Federal Trade Commission*, 217 F.2d 867 (C.A. 7, 1954); *Northern Pacific Railroad Company*, 356 U.S. 1, 78 S.Ct. 514 (1958); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1961); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 C.A. 9, 1964); *United States v. Loew's*, 371 U.S. 38, 83 S.Ct. 97 (1962); see also *Guidry v. Continental Oil Co.*, 350 F.2d 342 (C.A. 5, 1965); *Broussard v. Socony Mobil Oil Co., Inc.*, 350 F.2d 346 (C.A. 5, 1965); *United States v. Bausch and Lomb*, 321 U.S. 707, 64 S.Ct. 805 (1944); *Federal Trade Commission v. Beechnut Packing Co.*, 257 U.S. 441, 42 S.Ct. 150 (1922); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503 (1960); as well as Section 3 of the Clayton Act: *Standard Oil of California v. United States*, supra, *Anchor Serum v. Federal Trade Commission*, supra; *Bales v. Kansas City Star*, 336 F.2d 439 (C.A. 8, 1964); *Standard Fashion v. Magrane-Houston Co.*, 258 U.S. 346, 42 S.Ct. 360 (1922); and see *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 808, 86 S.Ct. 1501 (1966).

[11] The Court below said (unanimously) that the District Court's finding that plaintiffs " 'were free to purchase either product [i.e. Defendants' other muffler] but chose Midas [was] erroneous." "The record," it said, "contains much evidence that there was a continuous effort on the part of Midas to enforce the exclusive dealer requirement." [Appendix B at 17].

[footnote continued]

tion 4 of the Clayton Act. *Simpson v. Union Oil Co. of California*, 377 U.S. 13, 84 S.Ct. 1051 (1964), rev'ing 311 F.2d 764 (C.A. 9, 1963); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259 (1951); *Moore v. Mead's Fine Bread Company*, 340 U.S. 944, 71 S.Ct. 528 (1951), vacating 184 F.2d 338 (C.A. 10, 1950); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996 (1948); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705 (1959); *Radiant Burner Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365 (1961); *Radovich v. National Football League*, 352 U.S. 445, 77 S.Ct. 390 (1957).

Circuit Judge Walter E. Cummings, who sat on the Court below, agreed with these authorities. In a dissenting opinion he said [Appendix B at 22-23]:

[footnote 11 continued]

In instructions to their salesmen, defendants described franchisee purchases from defendants' competitors variously as a "felony", as "promiscuous," and as a "capital offense" [AA 32]. Defendants "required" those people who were part of the program to be "part of it all the way" [AA 28]. They ordered their salesmen to "see to it that" their exclusive dealing program was "enforced and tell [them] when it wasn't" [AA 31].

Defendants "studied each and every Midas order" as it was processed for shipment to "isolate" those dealers who were not buying tailpipes from them; they distributed the results of this "study" to their salesmen with instructions to enforce the exclusive dealing provisions in the franchise agreement [AA 25, 36-37].

Defendants' salesmen carried out their instructions. One such salesman wrote the plaintiff Ross that it was "Midas policy" that Ross buy "exclusively from Midas." He told Ross he would "go into the matter more fully" on his next visit [AA 40]. The same salesman also complained to Ross that Gordon Sherman (who was president of Midas) had advised him that Ross was "not purchasing clamps from Midas" stating he had to "report" to Sherman on this matter [AA 88].

Plaintiffs Skarupa and Pierce testified to conversations with the defendants' salesmen in which they had been threatened with franchise termination if they purchased from "outside sources" [e.g. AA 78].

"I agree with the majority that *Crest Auto Supplies, Inc. v. Ero Manufacturing Company*, 360 F.2d 896 (7th Cir. 1966) supports the in pari delicto defense to Counts I and II. However, an examination of the briefs filed in *Crest* reveals that *Simpson v. Union Oil Co.*, 377 U.S. 13, was not cited to this Court. A close study of the *Simpson* case, including the briefs filed therein, convinces me that the Supreme Court would not accept the *in pari delicto* defense here. As with these plaintiffs Simpson had freedom of choice to 'accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts.' He 'deliberately and knowingly enter[ed] into [the] contractual obligations' (311 F.2d 764, 768, 769). In *Simpson*, the Ninth Circuit used the *in pari delicto* theory to deny him any recovery. That point was fully briefed in the Supreme Court which reversed, permitting Simpson to prevail. Therefore, I am forced to conclude that the Supreme Court rejected the *in pari delicto* defense. Judge McLean came to the same conclusion in *Lyons v. Westinghouse Electric Corporation*, 235 F.Supp. 526, 537 (S.D.N.Y., 1964), stating:

> "'It may be noted that under *Simpson v. Union Oil Co.*, supra, the fact that plaintiffs voluntarily entered into an illegal contract does not in itself bar their recovery. The contract, if illegal, is still an actionable wrong.'

"In *Simpson*, even Mr. Justice Stewart's dissent agreed that the *in pari delicto* reasoning of the Ninth Circuit was 'untenable' (377 U.S. at p. 25). As in *Simpson*, these defendants had the coercive power to terminate plaintiffs' franchises if plaintiffs did not adhere to the resale price maintenance and exclusive dealing provisions. These plaintiffs wished to buy various parts (tailpipes, clamps, etc.) from competitors of Midas, who were selling at lower prices than Midas. If they had been permitted to purchase at these lower prices, they would have been able to lower their price, as did Simpson."

The Court below considered only two of this Court's decisions on Section 4 in its opinion: *Kiefer-Stewart,* supra, and *Simpson,* supra. It relied upon *Kiefer-Stewart,* supra, for the proposition that the *in pari delicto* defense is favored under Section 4, except ". . . where the defense is the unclean hands of a plaintiff in transactions other than one in suit. . . ."[12] This interpretation does not square with the plain language of this Court's opinion in that case. In *Kiefer-Stewart,* supra, the trial court instructed the jury that Kiefer-Stewart's participation in a conspiracy with other wholesalers, as alleged, constituted no defense. In its opinion this Court said:

> ". . . If Petitioner and others were guilty of infractions of the antitrust law, they could be held responsible in appropriate proceedings brought against them by the Government or by injured persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured. Cf. *Fashion Originators Guild v. Federal Trade Commission,* 312 U.S. 457, 668, 61 S.Ct. 703, 85 L.Ed. 949; *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219, 242-243, 68 S.Ct. 996, 1009, 92 L.Ed. 1323." (at 214)

With respect to *Simpson,* supra, the Court below said that this Court did not mention *in pari delicto* in its opinion in that case; that the facts in the instant case were "a far cry" from those in *Simpson*; and finally that *Simpson* involved nothing more than the unlawfulness of Union Oil's coercive consignment agreement.

Simpson cannot be read as the majority of the Court below apparently did, without reference to the opinion which it reversed, 311 F.2d 764 (C.A. 9, 1963). In the Ninth Circuit Court of Appeals, Simpson's antitrust claim was denied for precisely the same reasons which the majority of the

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[12] Appendix B at 11.

Court below used to deny the claims of these plaintiffs.[13] *In pari delicto* was fully argued and briefed by both Simpson and Union Oil in this Court. We submit that in *Simpson,* supra, this Court held not only that Union Oil's consignment agreement was unlawful but also that antitrust plaintiffs are not barred from bringing an action under Section 4 of the Clayton Act simply because they accept agreements binding them to follow price schedules fixed by their suppliers where their suppliers require such agreements as a condition of doing business.

Simpson and the case before the Court are nearly parallel:

SIMPSON v. UNION OIL CO.	CASE BEFORE THE COURT
1. Simpson sued Union Oil under Section 4 of the Clayton Act charging that defendants had violated Section 1 of the Sherman Act.	1. Plaintiffs sued under Section 4 of the Clayton Act charging that defendants had violated Section 1 of the Sherman Act.[14]
2. Simpson complained that Union Oil required him to sell at prices which Union fixed.	2. Plaintiffs complained that defendants required them to sell merchandise which they had purchased from defendants at prices which defendants fixed.[15]
3. Union Oil used its service station leases as a tying device. It tied its leases to its gasoline consign-	3. Defendants used their franchise agreement as well as the Midas muffler as tying devices. These

[13] Compare the language of the Court's opinion, Appendix B at 12-13, with the language of the Ninth Circuit's opinion in *Simpson,* 311 F.2d at 768-769.

[14] In addition, plaintiffs alleged violations of Sections 2 and 3 of the Clayton Act (15 U.S.C. 13, 14); supra at 7.

[15] Plaintiffs also alleged that they had been required to deal exclusively with defendants, purchase tied products from the defendants and that defendants had discriminated with respect to the terms and discounts on which they sold automotive exhaust system parts to plaintiffs and other of their customers [AA 44-46].

ment agreements in order to promote its price-fixing policies.

devices were used to promote defendants' price-fixing policies and to compel the purchase of tied products such as non-trademarked tail pipes, exhaust pipes, muffler clamps, hangers and Hollywood Mufflers.

4. Simpson accepted Union Oil's consignment agreement and lease with full knowledge that he was required to sell at prices fixed by Union Oil. This was the only basis on which Union Oil would do business with Simpson.

4. Plaintiffs accepted the unlawful restrictions in defendants' franchise as the only basis on which defendants would do business with plaintiffs. One plaintiff, Pierce, accepted defendants' franchise only after he was threatened with enfranchisement of a competitor as a Midas dealer, and with the sale of the International Muffler to his competitors.[16]

5. Union Oil threatened to discontinue business relations with Simpson and refused to renew Simpson's lease because Simpson refused to adhere to defendants' price-fixing policies.

5. Defendants threatened to terminate plaintiff's franchises if they refused to adhere to defendants' price-fixing, exclusive dealing and tying policies. Defendants terminated the franchise of the plaintiff Pierce when he refused to deal exclusively with the defendants and buy their tied products.[17]

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[16] At the time defendants offered him a Midas franchise, plaintiff Pierce was already buying defendants' "International" brand muffler. Defendants suggested that they would start selling the "International" muffler to someone else if he refused to accept the franchise agreement [AA 62].

Plaintiff Ross was selling automobile glass at the time he accepted defendants' franchise. Defendants promised that he could continue his profitable business of selling glass [AA 38-39, 70-71, 89]. But see footnote 17 infra.

[17] See, e.g., AA 33, 34, 64-65. In 1958 defendants also changed the rules on plaintiff Ross and threatened to terminate his franchise if he continued selling glass [38-39, 70-71, 89]. Ross, who invested thousands of dollars ($129,000) in advertising defendants' muffler, discontinued the sale of glass to protect his investment in defendants'

[footnote continued]

6. The District Court granted summary judgment in favor of Union Oil holding that Simpson lacked standing to sue because he had agreed to the unlawful restrictions in the first instance.	6. The District Court granted summary judgment in favor of defendants, holding that plaintiffs lacked standing to sue because they had agreed to the unlawful restrictions in the first instance.
7. The Court of Appeals for the Ninth Circuit affirmed, holding that Simpson's "consent" barred recovery from Union Oil.	7. The Court of Appeals for the Seventh Circuit affirmed, holding that plaintiffs' consent barred recovery from defendants.

The thirty-day cancellation provisions[18] in their franchise agreements "laced [plaintiffs] into an arrangement," just as in *Simpson*, supra, under which the supplier-defendants had the power[19] to compel plaintiffs to adhere to provisions in

[footnote 17 continued]
muffler [AA 70]. Still later, after defendants changed the terms of their guarantee and terminated Pierce, Ross terminated his franchise.

[18] Plaintiffs did not even enjoy the security of the one-year leases which Union Oil used. Plaintiffs' franchises could be terminated at any time [AA 58].

[19] Defendants' muffler was nationally advertised and carried a guarantee which defendants' competitors did not offer. Plaintiffs profited from the sale of this muffler. It was this fact which "tied" plaintiffs into the defendants' unlawful program. But for the profitable character of defendants' nationally advertised and trademarked Muffler with its 100% lifetime guarantee, defendants could not have compelled plaintiffs to observe the restraints in the defendants' agreement. Plaintiffs feared the loss of this profitable product in which they had invested thousands of dollars (over $400,000) of advertising. In this connection see *United States v. Loew's, Inc.*, 371 U.S. 38, 45, 83 S. Ct. 97, 102 (1962): Sufficient economic power to impose an unlawful restraint "may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

The Courts below asserted that plaintiffs profited from the very practices about which they complained. This erroneous argument is irrelevant. See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S.Ct. 1326 (1967). Plaintiffs profited from sales of defendants' Midas Muffler in spite of and not from or because of the exclusive dealing provisions in the franchise agreement. It is difficult to imagine how

[footnote continued]

the franchise agreements which required them to (1) buy exclusively from defendants, (2) purchase non-trademarked exhaust system parts as a condition of buying MIDAS mufflers, and (3) sell trademarked and non-trademarked exhaust system parts at prices fixed by defendants. As in *Simpson*, supra, the plaintiffs had the freedom to accept or reject the defendants' franchise agreement; if they rejected defendants' franchise agreement, defendants would not sell them their MIDAS muffler; to buy defendants' MIDAS muffler, plaintiffs had to enter into a franchise agreement. This was the only basis on which defendants would do business.

The Court below said that ". . . coercion [could not] be a factor herein" because plaintiffs "solemnly subscribed"[20] to defendants' franchise agreement which spelled out the restrictions that were the subject of their complaint. It then applied the *in pari delicto* doctrine with the caveat that the defense is available except in cases of plaintiffs ". . . who are coerced *into* illegal agreements. . . ."[21] [Emphasis supplied.]

In effect the Court below permitted defendants to use the franchise agreement which they had drafted, and for which they were solely responsible, to insulate themselves from liability for their subsequent acts requiring plaintiffs to adhere to the exclusive dealing, tying, and price-fixing provisions in those franchises. The Court below ignored the fact that defendants had no right to impose exclusive dealing and price-fixing requirements as part of their franchise agreements, *Goodyear Tire and Rubber Co. v. F.T.C.*, 331 F.2d 394, 401 (C.A. 7, 1964), aff'd 381 U.S. 357, 85 S.Ct. 1498 (1965); the fact that defendants' franchise agreements were illegal even if they were not coercively

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[footnote 19 continued]

plaintiffs could have profited from a practice of paying defendants more for parts than they would have otherwise paid if they had purchased such parts from defendants' competitors.

[20] Appendix B at 6, 9.

[21] Appendix B at 11.

induced, *Sun Oil Company v. F.T.C.*, 350 F.2d 624, 636 (C.A. 7, 1965), *cert. denied* 382 U.S. 982, 86 S.Ct. 559 (1966); as well as the fact that plaintiffs accepted defendants' franchise agreements as the only basis on which defendants would do business with them and not in any effort to assist, help, or cooperate with defendants in violating the antitrust laws. The Court below even refused to attach any legal significance to the fact that defendants adopted and used subtle and sophisticated techniques, ranging from covert threats of franchise termination to full-blown termination in cases where actual threats proved ineffective, to compel plaintiffs and other franchisees to observe the unlawful provisions in their franchise agreements.[22] See *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960); *Osborn v. Sinclair Refining Co.*, 324 F.2d 566 (C.A. 4, 1963); and *Goodyear Tire & Rubber Co. v. F.T.C.*, supra, at 401.

Under the Seventh Circuit's theory, defendants' franchise document constitutes a privately created exemption[23] from the provisions of Section 4 through which franchisors, with complete immunity from franchisee suits under the provisions of Section 4, may require exclusive dealing, fix prices, and effect other unlawful restraints[24] without regard to the public policy legislatively defined in the Sherman and Clayton Acts. The decison of the Court below not only allows

[22] Supra, footnote 11.

[23] Section 4 is not subject to the construction made by the Court below. Section 4 authorizes "any" person injured by reason of anything forbidden in the antitrust laws to sue therefor and recover threefold damages. This Court has construed language similar to the language in Section 4 in other statutes as not permitting any exceptions or any limitations. *Adams v. Maryland*, 347 U.S. 179, 74 S.Ct. 442 (1954); see *Anchor Serum v. Federal Trade Commission*, 217 F.2d 867 (C.A. 7, 1954); and see generally "Standing to Sue Under Section 4 of the Clayton Act," 64 Col. Law Rev. 570 (1964).

[24] i.e. Limit the persons to whom purchasers may sell merchandise, the prices therefor, or the areas in which they may resell. But see *United States v. Arnold Schwinn*, __ U.S. __, 87 S.Ct. 1856 (1967).

defendants to deny their competitors free access to a market for their products but goes far beyond this and permits defendants also to interfere with a purchaser's right to sell to whom he pleases [e.g., AA 26] at prices of his own choosing [e.g., AA 26, 38]. But see *United States v. Arnold Schwinn & Co.*, __ U.S. __, 87 S.Ct. 1856 (1967). Section 4 cannot bear this construction.

The Seventh Circuit's theory in this case virtually destroys Section 4 as a weapon for enforcement of Section 1 of the Sherman Act and Section 3 of the Clayton Act.[25] Sections 1 (in the absence of conspiracy) and 3 require an agreement;[26] consent is a necessary element of such an agreement. Without consent, the agreements which Section 3 of the Clayton Act and Section 1 of the Sherman Act both condemn cannot exist, and plaintiffs cannot state a cause of action. See, *McElheney v. Western Auto Supply Co.*, 269 F.2d 332 (C.A. 4, 1959). Having shown an agreement to satisfy the test of those sections, i.e., the franchise contract on which the defendants' whole business concept is predicated, plaintiffs are

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[25]Under the Seventh Circuit's theory franchisees waive their right to the benefits of Section 4 (15 U.S.C. 15) by entering into a franchise agreement even though the agreement is enforced in violation of Section 1 of the Sherman Act (15 U.S.C. 1) and Section 3 of the Clayton Act (15 U.S.C. 14). But see *Osborn v. Sinclair Refining Co.*, 324 F.2d at 573:

> "If the seller pressures his customers or dealers into adhering to resale price maintenance, or exclusive dealing or tie-ins, he has put together an unlawful arrangement and taken himself outside the narrow protection afforded by Colgate. See e.g. *United States v. Schrader's Son, Inc.*, 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471 (1920); *Englander Motors, Inc. v. Ford Motor Company*, 267 F.2d 11 (6th Cir. 1959); *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787 (2d Cir. 1960)."

[26]Section 1 of the Sherman Act (15 U.S.C. 1) condemns contracts as well as conspiracies, *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1, 73 S. Ct. 514 (1958); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960).

thrust onto the horns of a false dilemma: the consent essential to the very agreement which they must show to state a cause of action, constitutes a bar to their recovery.

Neither *in pari delicto* nor "consent" has a place in the judicial enforcement procedures established by Section 4. See "*In Pari Delicto* And Consent As Defenses in Private Antitrust Suits," 78 Harv. L. Rev. 1241 (1965); "Limiting the Unclean Hands and In Pari Delicto Defenses in Antitrust Suits–An Additional Justification," 54 N.W. Law Rev. 456 (1959).[27] This Court has said that a claim under Section 4 "need only be tested under the Sherman Act's prohibition on unreasonable restraints of trade, . . . and meet the requirement that petitioner has thereby suffered injury." *Radovich v. National Football League*, supra, at 453; *Klor's v. Broadway-Hale Stores, Inc.*, supra; *Radiant Burner, Inc. v. Peoples Gas Co.*, supra; "Standing To Sue for Treble Damages under Section 4 of the Clayton Act," 64 Columbia L.Rev. 570 587 (1964). To the same general effect, see *Mandeville Island Farms v. American Crystal Sugar,*[28] supra:

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[27] ". . . several other district courts have displayed an apparent disregard to the recent Supreme Court and circuit court cases which limited the defense. To the extent that this misunderstanding is accountable for the judicial hesitancy and apparent inconsistency in application, it is earnestly submitted that the courts are doing no injustice to the traditional use of the clean hands requirement by relaxing it in appropriate circumstances. On the contrary, proper application demands a weighing of public policy behind enforcing free competition on the one hand, with the public policy of forbearing aid to a plaintiff guilty of unconscionable conduct on the other. However, where Congress has codified the former public policy into the antitrust laws and has reannounced this policy several times, little evidentiary examination or measurement of comparative degrees of illegality is necessary; the call of public policy here is so loud and clear that it must be given decisive weight." [54 N.W. U. Law Rev. 464, 1959]

[28] In *Mandeville*, supra, the District Court held that Mandeville could not recover because it had failed to satisfy the commerce test and because it had signed a contract forming part of the illegal arrange-

[footnote continued]

"... It is enough that these Petitioners have suffered the injuries for which the statutory remedy is afforded. For the test of legality and immunity ... in view of the statute's policy, ... [is] whether the statute's policy has been violated in a manner to produce the general consequences it forbids ... for particular individuals essential to the recovery of treble damages." (at 243)

The Seventh Circuit's decision does not even accord these plaintiffs standing equal to the standing which this Court granted the plaintiff in *Moore v. Mead's Fine Bread,* supra. There was much more reason to apply the *in pari delicto* defense in *Moore,* supra, than there is to apply it or an alternative defense of "consent" to the case before the Court. Yet in that case this Court did not permit the defense, despite the fact that Mead's violations were an attempt to protect itself against unlawful, predatory practices which Moore had initiated. Moore was the direct and specific cause of his own damage. Moore, nevertheless, sued for treble damages under Section 4. The *in pari delicto* defense was specifically asserted and rejected even though Moore stood truly *in pari delicto.*[29]

The ruling by the Court below defeats the legislative purpose of Section 4 of the Clayton Act. It forecloses potential actions by a vast class of private persons who out of self-interest sue and thereby supplement government actions

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[footnote 28 continued]
ment of which it had complained. The Court of Appeals affirmed on the commerce issue alone. This Court reversed, thereby rejectin the *in pari delicto* defense that defendant had specifically pleaded.

[29]Plaintiffs here are not *in pari delicto.* Plaintiffs have not violated Section 3 which condemns leases, sales and contracts for sale (15 U.S.C. 14). By purchasing or making contracts for purchase plaintiffs did not violate the terms of that section. But the decision of the Court below in dismissing plaintiffs' Clayton Act (Section 3) claim rests squarely on the *in pari delicto* doctrine and nothing else.

Plaintiffs here were merely the victims of an unlawful franchise scheme which defendants adopted and successfully applied.

enforcing the antitrust laws. This Court explained the purpose of Section 4 in *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 67 S.Ct. 1015 (1947), as follows:

> ". . . This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong reliable motive for enforcement which relieves the Government of the cost of enforcement. . . . It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave any injured party a private cause of action in which his damages are to be made good threefold and reasonable attorneys' fees." (at 751 and 752)

Injured persons need not wait for either the Department of Justice or the Federal Trade Commission to compel compliance with the antitrust laws. In Section 4 (and in Section 16, 15 U.S.C. 25) Congress has given them tools to compel compliance[30] and achieve economic redress. Section 4 of the Clayton Act arms and was intended to arm buyers and sellers such as these plaintiffs and these defendants as well as competitors of one another with both the motivation of financial reward and the legal weapon to enforce fundamental concepts of fair competition legislatively spelled out by both the Sherman and Clayton Acts. Indeed, private suits under Section 4 play and were intended to play a vital role in promoting competition. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 869 (1955); see, e.g., *J. I. Case Co. v. Borak*, 377 U.S. 426, 432, 84 S.Ct. 1555, 1560 (1964).

The Seventh Circuit's theory in this case produces paradoxical results. It denies benefits of the antitrust laws to one of the very classes of persons that those laws were de-

[30]If the "in pari delicto" defense is available in an action under Section 4, it is, together with the defense of "unclean hands," equally available in an action under Section 16 (15 U.S.C. 25).

signed to protect,[31] negates effective enforcement of the antitrust laws by the very persons who have the closest and perhaps the only personal knowledge of antitrust violations, and at the same time allows defendants to perpetuate practices which the Clayton and Sherman Acts were designed to stop. If Section 4 is to achieve its legislative purpose of amplifying enforcement of the antitrust laws, Federal Courts should not be permitted to override the public policy of Section 4 by expressing a judicial "hostility"[32] to treble-damage claims through the application of common-law principles which antedate the enactment of Section 4.[33] Had Congress intended to include these common law principles as part of its statutory pattern, it would have done so.[34] The Court below, however, should not be permitted to do judicially what Congress refrained from doing legislatively. See "The Unknown Quantity in Private

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[31] *Bales v. Kansas City Star*, 336 F.2d 439 (C.A. 8, 1964); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960).

[32] "Hearings on the Role of Private Antitrust Enforcement in Protecting Small Business Before a Subcommittee of the Senate Select Committee on Small Business," 85th Cong., 2nd Sess. (1958), at 129 (Hansen), at 12 (Loevinger); "The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits," 52 Mich. L. Rev. 363, 364 (1954); "Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of Business," 80 Harv. L. Rev. 1566, 1569 (1967).

[33] The District Court's opinion in this case, which the Court below quoted, demonstrated its "hostility" to plaintiffs' claims when it said it would not allow plaintiffs the "high profit" of a treble-damage suit. [Appendix B at 3]. This avoids the central issue which is whether plaintiffs were in fact damaged. This statement also demonstrates the Court's fundamental misunderstanding of the purpose of Section 4 (15 U.S.C. 15).

[34] Some State antitrust statutes have incorporated in their language the common law concepts which the Court below used to deny plaintiffs relief. See e.g., Kan. Gen. Stat. Anno. ¶ 50-116 (1949).

Antitrust Suits—The Defense of In Pari Delicto," 42 Va. L. Rev. 785, at 787 (1955).

The drastic implications of the Seventh Circuit's holding in which defendants' franchise agreement was validated with the imprimatur of that Circuit can be partially measured by reference to its prospective application to franchising which is "one of the most rapidly growing methods of distribution today" in the United States.[35] Franchising is currently a 70-billion-dollars-a-year industry of 450,000 franchisees.[36] One out of every four dollars of the nation's retail sales is made through franchise outlets.[37] According to proponents of franchising, "many franchise systems are and must by their very nature be based on a relationship of exclusive dealing."[38] "Almost all [franchise agreements] specify that no competing lines may be carried and no business of a competing nature may be conducted."[39] According to Rufus E. Wilson, Chief of the General Trade Restraints Division of the Federal Trade Commission, ". . . the very nature

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[35]The Franchise System of Distribution, Edwin H. Lewis and Robert S. Hancock (1963), at 1.

[36]The New York Times, July 9, 1967, section 3 at pp. 1, 12. The current importance of franchising and its antitrust implications is demonstrated by the fact that both the Federal Bar Association and the American Bar Association devoted antitrust programs to the subject of franchising at their recent annual meeting. 316 ATRA, A-1 (August 1, 1967); 317 ATRA, A-1 (August 8, 1967). See also S. 2321 sponsored by Sen. Hart, designed to protect franchisees against cancellation by the franchising company.

[37]The New York Times, *ibid* at p. 1.

[38]"Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate on S. 2549," 89th Cong., 2nd Sess., at 1076 (Statement of Lewis Rudnick, Counsel for the International Franchise Association).

[39]The Franchise System, *Ibid* at 41.

of a franchise agreement suggests a restraint of trade. . . ."[40]

Without the deterrent force of the treble-damage provisions of Section 4 the number of antitrust violations undoubtedly will increase. If the Seventh Circuit's theory stands, franchisors can make a mockery of the provisions of Section 4 (as well as other sections of the Sherman and Clayton Acts) by the absurdly simple technique of reducing unlawful antitrust restrictions to the very agreements which the antitrust laws specifically condemn.[41] Moreover, the theory of the Court below will also preclude every franchisee who has already signed an agreement with his franchisor [which unlawfully restricts his right (1) to sell merchandise which he has purchased (a) to whom he pleases, and (b) at prices of his own choice, or (2) to buy from whom he wants] from complaining under Section 4.[42] Franchisors have little to fear from their antitrust schemes if their only exposure to franchisees is the threat of the prospective provisions of an injunction under Section 16 (15 U.S.C. 25).

Private enforcement is essential to the effective administration of the antitrust laws. The Department of Justice

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[40] "Briefing Conference on Antitrust Laws and Trade Regulations Sponsored by Federal Bar Association," January 4, 1962. See, e.g., *Robinson and Sons, Inc. v. Mr. Donut of America, Inc.*, 313 ATRA at A-10 (July 11, 1967), in which a recent treble-damage plaintiff sued under Section 4 alleging that it had been required to deal exclusively with its franchisor. See also *Siegel v. Chicken Delight, Inc.*, 319 ATRA at A-12 (August 22, 1967).

[41] Franchisors could offer their unlawful franchise agreements until accepted. Potential franchisees who refused to accept would not have a cause of action because they would have no contract within the meaning of Section 3; e.g. *McElhenney v. Western Auto Supply Co.*, 269 F.2d 332 (C.A. 4, 1959). On the other hand, if franchisees accept the franchisors' agreement they will be barred, ipso facto, under the Seventh Circuit's "consent" theory.

[42] E.g., *Robinson & Sons, Inc. v. Mr. Donut of America, Inc.*, 313 ATRA at A-10 (July 11, 1962), footnote 40. See also, *Siegel v. Chicken Delight*, 319 ATRA at A-12 (August 22, 1967).

and the Federal Trade Commission do not have either the financial or administrative ability to sift out all violations and act upon them by themselves. Moreover, the penalties which these agencies are permitted to seek may be far less effective than the provisions of Section 4 of the Clayton Act since the damages which grow out of Sherman and Clayton Act violations can exceed by far the criminal and civil penalties which a court is likely to impose in an action brought by the Government. The threat of a damage action is a potent deterrent to violations of the antitrust laws. It is in fact the most effective deterrent against such violations. See "Unclean Hands, The Effect of Antitrust Violations on Antitrust Actions," 113 Pa. L. Rev. 1071, 1080 (1965).

II

Except in the Seventh Circuit the Right of Dealer To Sue His Supplier for Antitrust Violations Under Section 4 Has Been Consistently Sustained.

If the instant suit had been brought in any other Circuit except the Seventh, plaintiffs' right to maintain their action would have been sustained. Neither *in pari delicto* nor "consent" would have barred their standing to sue. *Osborn v. Sinclair Refining Co.*, supra; *Bales v. Kansas City Star,* 336 F.2d 439 (C.A. 8, 1964); *Broussard v. Socony Mobil Oil Auto Co.,* 350 F.2d 346 (C.A. 5, 1965); *Guidry v. Continental Oil Company,* 350 F.2d 342 (C.A. 5, 1965); *Red Rock Bottlers v. Red Rock Cola Co.,* CCH Trade Cases 1953 ¶ 67,375 (D. Ga., 1952).[43]

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[43] ". . . the plaintiff was not in business, could not be coerced, and was organized and created for the purpose of engaging in business by reason of the rights granted under the contracts which contained the provisions now challenged, and did so operate for several years.

* * *

"Here the provisions of the contract which are challenged are for the benefit of the defendants. Plaintiff derived no benefit from act-

[footnote continued]

In *Osborn v. Sinclair Refining Co.*, supra, the Fourth Circuit held that attempts to control dealer judgments as to purchases of automotive products by pressure, threatened loss of dealer's lease, and finally lease termination, were unlawful and gave rise to a treble-damage action by the dealer. In language strikingly similar to the language of this Court in *Bruce's Juices,* supra, the Fourth Circuit said:

> "The treble-damage action under Section 4 of the Clayton Act 'supplements government enforcement of the antitrust laws,' *United States v. Borden Co.*, 347 U.S. 514, 518, 74 S.Ct. 703, 706, 98 L.Ed. 903 (1954). Or as another court has put it, 'The grant of a claim for treble damages to persons injured was for the purpose of multiplying the agencies which make them more effective.' *Kinnear-Weed Corp. v. Humble Oil and Refining Co.*, 214 F.2d 891, 893 (5th Cir. 1954), cert. denied 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715 (1955). The limitation upon the recoverable damages in a private antitrust suit, such as was imposed by the court below, would in large measure frustrate this salutary purpose." (at 572)

Lessig v. Tidewater Oil Co., 327 F.2d 459 (C.A. 9, 1964), and *Bales v. Kansas City Star,* supra, are to the same effect. In both cases distributors attempted to restrict the activities of their dealers. Lessig, a Tidewater dealer, was required to maintain prices fixed by Tidewater. Bales, a Kansas City Star dealer, was required to agree that he would not sell or circulate any other newspaper except the Star. In both cases the courts sustained the dealer's right to sue under Section 4.

Although the Seventh Circuit was aware of these decisions, it refused to follow them. In its opinion it cited only two of these decisions: *Osborn,* supra, and *Bales,* supra. It sought to distinguish *Osborn,* supra, on the ground that in

[footnote 43 continued]
ing under them; the provisions being restricted in character, they were of sole benefit to the corporate defendants.

"Under the facts of this case the plaintiff does not stand *in pari delicto* with the corporate defendants. . . ." (at page 67, 965)

that case there was no formal agreement. This distinction is without merit. The Court found an agreement in fact in that case[44] and authorized the recovery of damages growing out of an exclusive dealing agreement *to which Osborn had freely consented.*

With regard to *Bales,* the court below said that that case was different from the case before it because Bales had entered into the agreement only out of business necessity. Of course, as Circuit Judge Cummings pointed out (and as the record in this case shows), this is also true of the present plaintiffs.[45] Defendants would not do business with the plaintiffs unless they executed a franchise agreement which contained provisions requiring plaintiffs to deal exclusively with, accept tied products from, and sell at prices fixed by, the defendants.

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[44] 286 F.2d at 836-837.

[45] Appendix B at 22. Defendants' muffler franchise system was the only such system available in 1955-1956. If plaintiffs wanted a muffler franchise with national advertising and a replacement guarantee, they had no choice but to do business with defendants. See, e.g., *Goldlawr v. Shubert,* CCH Trade Cases 1967, ¶ 72,147 (E.D.Pa., 1967).

III

The Sherman Act Condemns Contracts in Restraint of Trade. Conspiracy Is Not Essential to a Claim Under Section 1 of the Sherman Act.

The court below dismissed plaintiffs' Sherman Act claim holding that plaintiffs had failed to prove conspiracy.[46] Conspiracy is not an essential element of a claim under Section 1 of the Sherman Act. The language of that Section is disjunctive, prohibiting contracts *or* combinations in the form of trusts as well as conspiracies. The record in the

[46] The plaintiffs disagree with the finding of the court below that no conspiracy existed [Appendix B at 13]. See *Hawaiian Oke & Liquors Ltd. v. Joseph E. Seagram & Sons, Inc.*, 317 ATRA X-1 (D. Hawaii, 7/27/67); *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914 (C.A. 5, 1952). The record raised an issue of fact as to conspiracy. Circuit Judge Cummings in his dissenting opinion noted this [Appendix B at 24]:

> "With respect to the majority's alternative basis discussed at p. 13 supra, this record shows that Midas and International held themselves out as separate and 'divorced'. Therefore, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.* [1950-1951 Trade Cases ¶ 69,952), 340 U.S. 211, does not permit defendants to claim that as a single business entity they were unable to conspire. Furthermore, under *Simpson v. Union Oil Co.* [1964 Trade Cases ¶ 71,085], 377 U.S. 13, and *Northern Pacific Railway Co. v. United States* [1958 Trade Cases ¶ 68,961], 356 U.S. 1, a conspiracy is not needed to support Count 1."

The record showed the defendants' corporations together constituted a complex multi-corporate structure in which one or more separately incorporated subsidiaries held themselves out as competitors of one another. Defendant International, for example, sold its International brand muffler which was identical to the Midas muffler (except for brand) to retailers who were in competition with plaintiffs, who purchased the Midas brand muffler from the defendant Midas [AA at 68]. Under such circumstances plaintiffs have for the purpose of summary judgment established a conspiracy within the meaning of Section 1 of the Sherman Act. See e.g. *Hawaiian Oke and Liquors Ltd.*, supra, in which the court held that even unincorporated sales divisions of a single corporation can conspire.

case at bar shows an agreement in restraint of trade within the meaning of Section 1 [AA 50-59]. Indeed, the record shows hundreds of such agreements spread all over the nation. These agreements are well within the prohibitions of Section 1 of the Sherman Act. *Northern Pacific Railroad v. United States,* supra; *Bales v. Kansas City Star,* supra; *Simpson v. Union Oil Co.,* supra.[47] It was plain error for the Court below to ignore these agreements and dismiss plaintiffs' Sherman Act count by simply asserting that plaintiffs had shown no conspiracy when proof of a conspiracy was not essential to plaintiffs' claim.[48]

IV

Plaintiffs' Right to a Decision on the Merits Was Denied by Summary Judgment Even Though the Record Disclosed Disputed Issues of Fact.

The summary judgment of the District Court conflicts with decisions of this Court which grant private antitrust plaintiffs the right to a decision on the merits. *Radovich v. National Football League,* supra; *Klor's v. Broadway-Hale,* supra; *Poller v. Columbia Broadcasting Co.,* 368 U.S. 464, 82 S.Ct. 486, (1962); *Continental Ore Company v. Union Carbide Corporation,* 370 U.S. 690, 82 S.Ct. 1404 (1962); *Simpson v. Union Oil of California,* supra. It was erroneous for the Court below to affirm the summary judgment entered by the District Court.

The record shows that plaintiffs and defendants were and are ready for trial. Discovery[49] by both defendants and plain-

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[47] Compare *Albrecht v. Herald Co.,* No. 975, in which this Court recently granted certiorari (February 27, 1967), involving a single contract of a news dealer who was terminated because he refused to follow the price policy established by the newspaper which he distributed.

[48] Plaintiffs' Sherman Act Count alleged a *contract or conspiracy* [AA 44-45].

[49] Both defendants and plaintiffs had completed an exhaustive discovery procedure in which thousands of pages of testimony by deposition

[footnote continued]

tiffs has been completed. Moreover, the decision of the Court below will not eliminate the necessity for trial of of this complex matter since the antitrust ramifications of plaintiffs' claim for damages arising from defendants' violations of the Robinson-Patman Act were remanded for trial.

The Court below segmented plaintiffs' antitrust claims as well as the record and refused to look at the full fabric of defendants' unlawful system of distribution and plaintiffs' claims based thereon. Having found as a "fact" that plaintiffs "consented" to defendants' franchise agreement, for example, the Court ignored the legal significance of plaintiffs' evidence of coercion, even though it held that subsequent coercion existed.[50] The fact that plaintiffs signed franchise agreements constitutes only one piece of evidence. The fact that defendants coerced plaintiffs into compliance with unlawful provisions in their franchise agreements is another. Indeed, it was not the plaintiffs' entering into defendants' franchise agreement but, rather, the defendants' ants' subsequent enforcement of the terms of that franchise agreement which constitutes the gist of the offense of which the plaintiffs complain. The existence of legal coercion is something that should have been decided on the basis of all evidence, not simply the signing of the agreement. If all facts were taken into consideration on the coercion issue, it is entirely possible and even probable that a jury would reach the conclusion that *in pari delicto* did not apply. See *Goldlawr Inc. v. Shubert,* supra. The existence of this genuine issue of fact precluded summary judgment.

[footnote 49 continued]

had been taken, hundreds of pages of answers to interrogatories had been filed, and thousands of documents had been marked for identification.

[50] Appendix B at 17; Footnote 11 supra.

The record disclosed other genuine issues of major and material fact with respect to the existence of conspiracy[51] as well as with respect to whether plaintiff Pierce's franchise was terminated on an "agreeable basis."[52] In view of these genuine issues of fact the case was not ripe for summary judgment. The Court below should have reversed the District Court's decision.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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[51] Footnote 46, supra.

[52] Supra at 14, footnote 11, supra; see also AA 22, 25, 33, 34, 64-65.

[Appendix A]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Tuesday, April 25, 1967

Before

Hon. J. Earl Major, Senior Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Walter J. Cummings, Jr., Circuit Judge

PERMA LIFE MUFFLER, INC., et al., Plaintiffs-Appellants No. 15862 vs. INTERNATIONAL PARTS CORP., et al., Defendants-Appellees	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, and REVERSED in part, and that this cause be, and the same is hereby REMANDED to the District Court for further proceedings.

It is further ordered and adjudged by this Court that the costs of this appeal be divided equally between the parties.

[Appendix B]

In the United States Court of Appeals For the Seventh Circuit

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SEPTEMBER TERM, 1966, JANUARY SESSION, 1967

No. 15862 PERMA LIFE MUFFLERS, INC. *et al.*, *Plaintiffs-Appellants,* v. INTERNATIONAL PARTS CORPORATION *et al.*, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 25, 1967

Before MAJOR, *Senior Circuit Judge,* and SCHNACKENBERG and CUMMINGS, *Circuit Judges.*

MAJOR, *Senior Circuit Judge.* Plaintiffs brought this action in a three-count complaint for the recovery of damages allegedly sustained by reason of defendants' violation of the antitrust laws of the United States. They alleged in counts 1 and 2 that the terms of certain franchise agreements executed by the parties to govern their relationship in the purchase and sale of automotive exhaust systems parts through establishments displaying defendants' trade and service marks, "Midas" and "Midas Muffler Shop," illegally restricted plaintiffs in the operation of said shops. They alleged that the corporate and individual defendants joined in an illegal conspiracy to restrain trade, in violation of Sec. 1 of the Sherman Act (Sec. 1, Title 15 U.S.C.A.), and that they violated Sec.

3 of the Clayton Act (Sec. 14, Title 15 U.S.C.A.). They alleged in count 3 that the defendants violated Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act (Sec. 13, Title 15 U.S.C.A.), by granting discrimination in price and service to certain of their customers without offering or otherwise making available these same prices and services to plaintiffs.

The District Court, on a voluminous record and after numerous protracted hearings, sustained defendants' motion for summary judgment as to all counts. In its order entered May 24, 1966, from which the appeal comes, the Court held (1) that plaintiffs were in *pari delicto* and, therefore, without standing to complain about violations of Sec. 1 of the Sherman Act and Sec. 3 of the Clayton Act, and (2) that defendants' price and service discrimination did not constitute a violation of the Clayton Act, as amended by the Robinson-Patman Act.

Of the multiple plaintiffs, only four, Gregory Skarupa, Maxwell Ross, Joseph Pierce and Claude Wheeler, are here as appellants. Each of the plaintiffs, as well as others, was licensed under a franchise agreement with defendants to use the trade name, trademarks and service marks identified as "Midas" and "Midas Muffler Shops," in businesses which they operated in various states. Each plaintiff voluntarily entered into his first franchise agreement, and subsequently each sought and obtained franchises for additional shops.

The defendants were International Parts Corporation, three of its subsidiary corporations, plus six individual officers or agents of the corporate defendants. These ten separate legal persons constituted a single trading entity by which Nathan Sherman and his son, Gordon Sherman, conducted their family-owned business, including the sale of automobile exhaust systems.

In support of their motion for summary judgment, defendants presented to the District Court a 9-page detailed affidavit of the two Shermans, defendants and chief executive officers of the corporate defendants, and a 31-page appendix of excerpts from plaintiffs' depositions, answers to interrogatories or other record sources. Neither the affidavit nor the contents of the appendix

was challenged by the plaintiffs in the court below by counter-affidavits. Plaintiffs relied upon documentary proof, their deposition testimony and defendants' answers to interrogatories.

Judge Abraham L. Marovitz in a memorandum opinion, after a meticulous analysis of the factual situation and the case law, with reference to counts 1 and 2 stated:

> "It is clear from the undisputed facts before us that each plaintiff voluntarily entered into the franchise agreement at issue and accepted the benefits therefrom. They are, under the holdings in Rayco [234 F.Supp. 593] and Crest [246 F.Supp. 224] *in pari delicto* with defendants, and therefore unable to reap the harvest of their own misdeeds. Each plaintiff recognized that the franchise conveyed to him the right to use the various Midas trade names, trademarks and service marks, and each profited from the use of same. They are not now entitled to the high profit of a treble damage suit when they voluntarily acceded to, fostered, and profited from the very practice about which they now complain."

Subsequent to the entry of the judgment in the instant case, *Crest* was affirmed by this Court. *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.,* 360 F.2d 896.

In allowing defendants' motion for summary judgment on count 3 of the complaint, the District Court concluded:

> "* * * that any alleged difference in price or service between purchases by plaintiff of Midas brand exhaust parts and purchases by other persons of Midas or International brand parts from defendant did not constitute a discrimination violative of the Robinson-Patman Act, in that (a) plaintiffs did not compete with other purchasers of Midas brand parts; (b) plaintiffs had the opportunity to purchase either brand; and (c) the Midas exhaust parts system was unlike the International system in grade and quality."

We think the Midas history, taken in the main from the unchallenged affidavits of Nathan and Gordon Sherman, is relevant. International Parts and the other defen-

dants composed the single business entity by which the Sherman family sold exhaust parts. Prior to the Midas franchise plan, which defendants originated in 1955, exhaust system parts were sold to consumers from innumerable retail outlets, such as garages and service stations. A muffler was merchandised like most other automotive replacement parts, was given no special attention, enjoyed no consumer brand consciousness and required a labor charge for installation. All of this was changed by the introduction of Midas, with its nationally advertised trade names, nationwide chain of specialized exhaust system shops, unique guarantee and free installation.

A network of franchised dealers, each of whom purchased directly from International Parts and owned a retail outlet identified by the various "Midas" trade names and service marks, invited the public to a nationwide chain of automotive shops specializing in exhaust system parts. The dingy surroundings of the typical auto repair shop were replaced by the Midas atmosphere of cleanliness, comfort and prompt, courteous service. The guarantee of a new Midas muffler free to replace any that wore out as long as the customer owned the car was to be honored in each shop no matter where the first muffler was purchased.

Success for this new merchandising concept, and for each Midas dealer, necessitated that the American motorist recognize the Midas name and have confidence that each dealer was an exhaust specialist who handled the same quality product, provided the same clean and comfortable surroundings, gave the same prompt and dependable service and honored the same unique Midas guarantee. Millions were spent by defendants and the Midas dealers on national and local advertising to publicize this Midas story.

A franchise agreement was tendered to each prospective dealer. It required no franchise fee, construction expense or purchase of capital equipment from defendants, and it was cancellable by either party on 30 days' notice. No lease of real estate or other equipment from Midas was required; the franchise was a contract for the purchase of Midas products for resale from a retail outlet licensed by defendants to use the trademark "Midas"

and the service mark "Midas Muffler Shop." Unlike the traditional auto repair shops that purchased through middlemen, the Midas dealers purchased at a significantly lower cost directly from International Parts.

A national association of Midas dealers and a monthly magazine allowed each dealer to learn about and profit from the experiences of his fellow dealers and to visualize better the national Midas image. Select dealers, including plaintiffs, who were most interested in this image and who had attained the greatest success, were members of a dealers' National Advisory Council. International Parts employees, called Midas field counselors, were used to assist the dealers.

After obtaining their first Midas franchise agreement most dealers, including plaintiffs, subsequently opened additional shops. Virtually every dealer, particularly plaintiffs, enjoyed substantial monetary gains from participation in the Midas program.

The gist of plaintiffs' argument appears to be embodied in the following statement taken from their brief:

> "Appellants operated under their agreements with appellees retailing and installing the Midas mufflers from 1955-56 to 1959-60. During this period appellees sold appellants the Midas muffler with its lifetime guarantee. In return appellees required appellants to retail the muffler at prices fixed by appellees and to honor muffler guarantees on presentation. Appellants were also required to deal exclusively with appellees. To purchase the Midas muffler, appellants were required to purchase all other exhaust parts items from appellees. At the same time appellees refused to sell appellants or permit them to handle the International muffler (which also carried a lifetime guarantee) or any automobile parts other than automotive exhaust systems parts. Moreover, appellees also refused to allow appellants to purchase from any of appellees' competitors."

So far as we are able to discern, no claim is or ever has been made by plaintiffs that any restriction was imposed by defendants other than those provided in the franchise agreements.

Plaintiffs in their reply brief, apparently in recognition of the damaging effect of the undisputed testimony of the great benefit and profits which they derived from the Midas program, narrow the issue considerably. They characterize defendants' argument in this respect as "spurious." The brief states:

> "The practices about which the appellants complain are appellees' exclusive dealing and resale price maintenance practices, and not, as appellees suggest, the program as a whole. Appellants were required to pay more for exhaust system parts which they purchased from the appellees than they would have paid had they been free to purchase these same parts from competitors of the appellees. This is the practice about which the appellants complain. It is difficult to imagine how appellants could have profited from such a practice."

Assuming there is any factual basis for this assertion, which is disputed, restrictions about which they complain were contained in the franchise agreement to which each of the plaintiffs solemnly subscribed.

The four plaintiffs operated in separate areas of the nation, were previously unacquainted with each other, and all participated in the Midas program in a similar manner. Each of the twenty shops operated by plaintiffs bore the name, "Midas Muffler Shop," and displayed Midas advertising material. National advertising by defendants covered plaintiffs' markets and was supplemented by plaintiffs' local advertising.[1] Each of the plaintiffs was at one time a member of the National Advisory Council. Plaintiffs Skarupa, Ross and Wheeler on 30 or 60 days' notice abandoned the Midas program, as permitted under the franchise agreement, and entered the Robin Hood program.[2] Pierce's franchise was terminated by Midas, on an agreeable basis, and he entered the Robin Hood program.

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[1] The national advertising expenditure by defendants from 1956 through 1960 was $3,570,424. Advertising was in numerous national magazines, as well as by radio and television programs. Much of the latter was done over stations in the areas in which plaintiffs operated.

[2] The Robin Hood franchise program was sponsored by a competitor of International Parts Corporation. Its dealers sold items other than exhaust systems and there was no manufacturer's guarantee on the featured muffler.

The deposition testimony of each of the plaintiffs is highly significant and, standing alone, completely refutes any notion that their participation in the Midas program was other than on a voluntary basis, or that they were coerced in pursuing a course which they now claim was illegal and for which damages are sought. A brief resumé of such testimony will suffice.

Skarupa in 1955, while employed by the Veterans Administration, sought defendants' guidance in opening a muffler shop in the Washington, D.C. area. He was so enthusiastic about the prospect that he organized Perma Life Mufflers, Inc., and on April 10, 1956, was granted his first Midas franchise. He testified, "I was interested in the Midas program provided I got assurances that the Washington metropolitan area would be assigned to me so that if I developed it I could reap the benefits of such development." Skarupa executed three more Midas franchise agreements within two years, and then terminated his four franchises because he could not obtain franchises for three more Midas shops he wanted to open. He mainly complained that he was limited in his further expansion in the Midas program. He wanted to monopolize and profit from every possible Midas shop in the Washington area. When defendants refused his request in this respect, he terminated his Midas franchise and joined the Robin Hood program. Skarupa's profit during the years he participated in the Midas program was $200,000. In the present action, he seeks an additional $800,000 in damages suffered as a result of the alleged ill treatment accorded him by defendants. He also seeks damages in the amount of $60,000 per year because of defendants' refusal to grant him three additional franchises.[3]

Ross became a highly paid executive of a profitable chain of four Midas shops in Michigan. He wanted the Midas image, the guarantee, the advertising and the quick service. He recognized that merchandising exhaust parts by national advertising was originated by Midas

[3] Skarupa's answer to Interrogatory II: "Plaintiffs were not permitted to satisfy the demand for additional muffler shops in the Washington Metropolitan Area. Had they been permitted to, plaintiffs would have opened three additional shops which would have had additional sales of approximately $100,000 [illegible] year each, or a total additional sales of approximately $300,000 [illegible] year. Net profit would have averaged 20% per year. Damages: $6[illegible]er year."

and that by his participation in the Midas system his business gained a valuable image of substance and credibility. To Ross, the franchise "meant that I thought that this was a good idea. I thought that it was a way of making some real money if I got into it quickly. * * * The thing that excited me was the guarantee * * *," and was "an avenue for sales and profit for me." He was so well satisfied with the program that he acquired two additional franchises for shops in Minneapolis for the reason, "Well, I had a good measure of success in the Muskegon and Grand Rapid areas. I liked the program. It was making money for me. I wanted to get in a larger metropolitan area, and Minnesota was open. I wanted not only the Minneapolis [area] but [also] St. Paul." He offered to construct a new building to house a Midas shop, if granted another franchise. He continued under the Midas program until offered what he thought was the less restrictive Robin Hood franchise, and then terminated his franchises with Midas.

Pierce was operating three muffler shops in upstate New York when he learned about the Midas program, for which he sought and was granted franchises. Within one year he obtained three more franchises, giving him a chain of six Midas outlets in five cities. He organized and did business under three corporate names, Muffler Sales and Service, Inc., Midas Muffler Sales and Service, Inc., and Pierce Muffler Shops, Inc. He was so well satisfied with the program that he attempted to obtain a franchise for a friend. Some controversy arose between Pierce and defendants, and his franchises were cancelled by defendants, without objection by Pierce.

Wheeler, located in the St. Louis area, learned of the Midas program through an advertisement and requested a franchise, which was granted. He sought more franchises so that he could preclude prospective Midas dealers from entering the St. Louis area. Within twelve months of opening his first shop, he had signed two more franchise agreements. Wheeler terminated his franchises and joined Robin Hood because defendants would not give him exclusive rights in the St. Louis area.

Plaintiffs' radio, television and newspaper advertisements demonstrate their participation in and cooperation

with the defendants in the programs of which they now complain. In the sake of brevity, we refer only to those by Skarupa which are typical of the advertising of all plaintiffs:

"Member America's Only Coast-to-Coast Network of Exclusive Auto Muffler Shops."

"* * * we're specialists in just one thing—your car's exhaust system * * *."

"ANNOUNCING! The Newest Member of The Great National Network of Midas Muffler Shops."

"Look for the MIDAS Sign—America's only coast-to-coast network of exclusive auto muffler shops."

"* * * visit any one of Washington's three MIDAS MUFFLER SHOPS. Famous MIDAS mufflers come to you * * * installed FREE within fifteen minutes, while you watch* * * with a written guarantee from the factory for the lifetime of your car. It's a guarantee that follows you around the United States, to more than 200 cities bearing the MIDAS MUFFLER SHOPS sign * * *."

"* * * MIDAS dual exhaust specialists will convert your present single exhaust system to a dual, in practically no time at all. You see, MIDAS exhaust experts perform in minutes the work ordinary garages and dealers take hours to do * * *."

After reviewing plaintiffs' testimony, the District Court stated, "Under no circumstances could 'coercion' be said to have been a factor herein." We think that conclusion is inescapable. Moreover, their testimony supports the Court's finding, "They voluntarily acceded to, fostered, and profited from the very practice about which they now complain."

In support of their argument that the *pari delicto* defense is not available to antitrust defendants, plaintiffs on brief rely heavily upon and discuss at great length *Simpson* v. *Union Oil Co. of California,* 377 U.S. 13, 84 S.Ct. 1051, reversing 311 F.2d 764. They argue that *Simpson* "is dispositive of the *pari delicto* issue in this

case." We have read and reread this opinion, and do not agree. The Court does not mention *pari delicto* and we think it did not intend to annihilate a principle so long embedded in the law.

It appears that the hard core basis for the Court's decision resides in the fact that Union Oil was in a position by means of a lease to coerce Simpson to sell at prices fixed by Union Oil. Simpson was a retail dealer and leased from Union Oil the premises on which he did business. At the same time, he executed a consignment agreement with Union Oil. Both the lease and the agreement were terminable by either party at the end of any year, and the consignment agreement by its terms ended upon cancellation of the lease. As to this arrangement the Court stated (page 21):

> "By reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive."

When Simpson refused to comply with the terms of the consignment agreement, Union Oil cancelled his lease. By this action Simpson was deprived not only of the right to purchase from Union Oil but simultaneously of a place to do business. The Court concluded its opinion by stating (page 24):

> "We intimate no views on any other issue; we hold only that resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws, and that petitioner suffered actionable wrong or damage."

Without restating the facts of the instant case, it is sufficient to note that they are a far cry from those considered by the Supreme Court in *Simpson*.[4]

Plaintiffs on brief argue that the decision here under attack is not only contrary to the decision of the Supreme

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[4] It is significant that *Simpson*, decided by the Supreme Court more than two years prior to our decision in *Crest*, was not relied upon, not even cited, by the parties in *Crest*, either in the District Court or in this Court. *Simpson* was also not relied upon by either party in *Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Association*, 371 F.2d 263, 267, in which we reaffirmed the *Crest* rule.

Court in *Simpson* "but also contrary to the substantial weight of authority." We think the weight of authority is in the opposite direction. However, we see no point in citing or discussing plaintiffs' cases on this score inasmuch as in our recent decision in *Crest* (360 F.2d 896) we considered the same contention and in the main the same cases as are relied on here. In *Crest* we stated (page 900):

> "Plaintiffs refer to a 'feeling' in 'all the Courts' against the pari delicto rule in private anti-trust cases. The only animus we detect in the courts on the pari delicto question is directed at protecting those who are coerced into illegal agreements * * * [citing cases], or at permitting suits where the defense is the unclean hands of a plaintiff in transactions other than the one in suit, as the Supreme Court held in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214, 71 S.Ct. 259, 95 L.Ed. 219 (1951). But where a plaintiff participates freely in the alleged anti-trust conduct, the pari delicto rule precludes recovery. [Citing many cases.] As Judge Soper said in Pennsylvania Water, 209 F.2d at 134, the doctrine that a plaintiff who is a voluntary party to the allegedly illegal agreement which forms the basis for the anti-trust suit cannot recover thereon was 'firmly established in earlier cases,' and still remains to be given effect in appropriate actions."

Plaintiffs on brief assert that the *Pennsylvania Water* decision cited and quoted from by this Court in *Crest* "was inferentially overruled" by the same Circuit in its subsequent decision in *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, cert. denied 366 U.S. 963. We think in this plaintiffs are mistaken. In *Osborn*, there was no written franchise contract agreement or other form of arrangement by which the plaintiff obligated himself to be bound. More than that, the Court found that the grievance of which plaintiff complained was the result of coercion. No *pari delicto* defense was involved and, obviously, the Court did not overrule its previous decision in *Pennsylvania Water*.

Plaintiffs' reliance upon *Bales et al. v. The Kansas City Star Company et al.*, 336 F.2d 439, is even more

pointedly misplaced. In that case the Eighth Circuit, in a decision rendered five months after that of the Supreme Court in *Simpson* v. *Union Oil Co.*, 377 U.S. 13, gave recognition to the doctrine of *pari delicto* as a defense. The Court stated (page 444):

> "Of course, if the plaintiffs actually were in pari delicto with the defendants in the alleged endeavor of the Star to prevent competition and create a monopoly for itself in the area, the law should leave them where it finds them. But if they accepted the contract restriction only in business necessity and not in any sanction or furtherance of a trust endeavor by the Star, they would not be in pari delicto for purposes of the right to recover for such provable injury to their businesses as the Star's antitrust violation had occasioned." (Citing numerous cases, most of which we cited in Crest.)

In resumé, each plaintiff initially asked to become a participant in the Midas merchandising program and voluntarily, willingly and knowingly executed his first Midas franchise agreement. Each plaintiff thereafter eagerly sought additional shops in the Midas program and voluntarily executed additional franchise agreements for such shops. Each plaintiff at all times had the legal right to abandon the Midas program and to cancel these franchise agreements on 30 days' written notice. Three of the instant plaintiffs unilaterally terminated their franchises when it suited their convenience and the fourth acquiesced in the termination of his franchise. Furthermore, each plaintiff cooperated with defendants and all other Midas dealers in the conduct which plaintiffs now assert was illegal and injurious to their business and property. Each plaintiff accepted the benefits arising out of the franchise agreements and earned substantial and significant profits during the terms of such agreements. Each plaintiff sought to perpetuate the "wrong" of which he now complains by acquiring additional franchises, and Skarupa makes the contradictory claim that he is entitled to damages not only because of the "wrong" he suffered while a party to and operating under franchise agreements but also because additional franchises which he sought were denied. Presumably, he was so well

satisfied with the ill treatment which defendants assertedly imposed upon him that he sought the opportunity to suffer more of the same treatment.

It would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine. We hold that it was properly applied and given effect by the District Court.

The District Court further held as an alternative basis for the dismissal of count 1 of the complaint that no conspiracy existed as a matter of law. The Court found that the corporate and individual defendants were a single business entity through which a family business was operated. Based on this factual premise, with which plaintiffs take no issue, the Court, citing *Nelson Radio & Supply Co., Inc.* v. *Motorola, Inc.*, 200 F.2d 911, 914, held as a matter of law that no conspiracy as alleged in the complaint existed. At the same time the Court recognized, "While we agree with plaintiff that subsidiary corporations may under certain circumstances 'conspire' to violate the antitrust laws, the record before us indicates by uncontested facts that no such conspiracy was present here."

Plaintiffs in support of their argument on this point rely upon *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc. et al.*, 340 U.S. 211, which they claim involved the same type of conspiracy as that alleged here. In that case, while it appears there was common ownership and control of the corporate defendants, there was no finding such as we have where all the defendants were acting as a single business entity. As the District Court stated:

> "There is no evidence, except in plaintiffs' unsupported arguments that these corporations competed with each other or acted in any manner other than as a single integrated business. There are no acts alleged which could not have been done by a single corporation acting alone. Plaintiffs may not by mere pleading allegations and conclusions fragmentize a unified business to meet the conspiracy requirements of the Sherman Act."

We agree with the reasoning and hold that count 1 was properly dismissed on this alternative basis.

Defendants argue as a further defense that the Midas franchise agreements, and the merchandising methods employed by plaintiffs, defendants and the other Midas dealers in connection therewith, were reasonable and legal means to protect the various Midas trade names, trademarks and service marks licensed to plaintiffs by such franchise agreements, and that such agreements and merchandising methods were not prohibited by the Sherman or Clayton Acts. As plaintiffs point out, at one stage of the proceedings this defense was on their motion stricken. Defendants contend that subsequently the defense was reinstated and may be relied upon here. On this score the record abounds with confusion. One thing, however, emerges with certainty, that is, that the District Court did not rule on the merits of this defense and, therefore, did not rely upon it in allowing defendants' motion for summary judgment on counts 1 and 2. In view of our agreement with the District Court as to the other grounds upon which the motion for summary judgment was allowed, we, like that Court, find no occasion to decide defendants' contention in this respect.

We now come to count 3, which charges defendants with the violation of Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act (Sec. 13, Title 15 U.S.C.A.), by price and service discrimination against plaintiffs and in favor of other customers.

Defendants' motion for summary judgment as to this count stated:

> "Any difference in price or service, as alleged in Count Three, between purchases by plaintiffs of Midas brand exhaust parts and purchases by other persons of Midas brand exhaust parts or International brand exhaust parts from defendants did not constitute a discrimination, in that:
>
> (a) Plaintiffs did not compete with other purchasers of Midas brand exhaust parts;
>
> (b) Plaintiffs had the ability and opportunity to purchase Midas brand exhaust parts or to purchase International brand exhaust parts;
>
> (c) Retailers' and consumers' preference for the Midas brand exhaust parts system as a premium

commodity, its inseparable and distinct guarantee, and its different metallic properties made it unlike in grade and quality to the International brand exhaust system."

The District Court at the time it allowed summary judgment as to counts 1 and 2 denied such judgment as to count 3, without prejudice to the right of plaintiffs to obtain defendants' answers to certain interrogatories which they had proposed. After defendants had supplied the information thus sought, the Court allowed summary judgment as to this count.

We reach the conclusion that the allowance of summary judgment as to count 3 was improper. In doing so, we see no point in citing or discussing the numerous cases called to our attention. It is sufficient to refer to two recent decisions of this Court, cited and relied upon by defendants. *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896; *Markwell* v. *General Tire and Rubber Co.*, 367 F.2d 748. In both cases summary judgments were affirmed. In *Crest*, as previously shown, the situation was similar to that here. In that case we affirmed summary judgment as to counts 1 and 2, based on the *pari delicto* defense. We affirmed summary judgment as to count 3, in the main for the reason that the complaint failed to allege that the practice complained of had any effect on competition. We also held that the affidavit filed in support of the motion was not controverted by counter-affidavit and there was thus no issue of material fact.

In *Markwell*, we sustained summary judgment on the premise that affidavits filed by the plaintiff in response to the motion for summary judgment failed to contradict those filed in support of the motion. In doing so we stated (page 750):

> "As the Supreme Court's Advisory Committee stated, Rule 56 (e) was amended to require a party opposing a motion for summary judgment, supported by affidavits, to produce enough evidentiary matter to establish a genuine issue for trial, for the 'very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'"

The situation in the instant case is far different. The sole affidavit offered by defendants in support of summary judgment was, as previously noted, that of Nathan and Gordon Sherman. While this affidavit was pertinent to the defense of *pari delicto* interposed as to counts 1 and 2, it bears no relevancy to the count under consideration. It neither denies nor offers any explanation as to the discriminatory practices alleged in count 3. Obviously, it required no counter-affidavit. More than that, the voluminous record here contains deposition testimony, answers to interrogatories and much documentary evidence, from which we think clearly emerge genuine issues for trial.

The District Court held that there was no intra-brand discrimination, that is, sale of Midas parts to other Midas dealers at prices lower than those charged plaintiffs, on the ground that such parties were not in competition. However, the Court's finding that there was no competition among such dealers is based solely upon plaintiffs' deposition testimony "that the geographic 'marketing area' in which they sold Midas products was the 'city or county' in which each shop was located, and that no other Midas dealer was located within that region of competition." This geographical situation, while a factor to be considered, in our view does not eliminate the issue as to whether there was or might have been competition. Customers of Midas dealers might be located in areas between dealers and willing to patronize any of them.

More important, the Court embraced defendants' contention that there was no legal discrimination against plaintiffs because they had the ability and opportunity to purchase either Midas brand exhaust parts or International brand exhaust parts (inter-brand). Relative thereto, the Court found:

> "* * * that plaintiffs, well aware of any price differentials that might exist between the two brands, having dealt with International previously, and in one instance having continued to do so, *freely* chose to forego purchases of International parts and to deal exclusively with Midas. * * * The evidence is uncontroverted in demonstrating that plaintiffs were

free to purchase either product, but chose Midas. No discrimination in a legal sense is present, and defendants are entitled to summary judgment."

We think this finding confuses the issue presented by count 3 with that which we have previously considered relative to counts 1 and 2. True, plaintiffs by their franchise agreement "*freely* chose to forego purchases of International parts and to deal exclusively with Midas." Thus, under the *pari delicto* doctrine, as we have held, they were precluded from complaining on that score. However, the fact that they were required to purchase from Midas at a price determined by it does not absolve Midas from the charge that it or International granted discriminations in prices and services to certain of their customers, without offering or otherwise making those same or similar services available to plaintiffs, as charged in count 3.

We think the finding, "The evidence is uncontroverted in demonstrating that plaintiffs were free to purchase either product, but chose Midas," is erroneous. Plaintiffs' freedom in this respect was forfeited by the terms of the franchise agreements. The record contains much evidence that there was a continuing effort on the part of Midas to enforce the exclusive dealer requirement.

A few excerpts from the record are sufficient to demonstrate at least that there was an issue as to whether plaintiffs were free to handle any product other than that purchased from Midas. On July 1, 1957, Gordon Sherman advised his "field counselors":

> "THE MOST SACRED PRINCIPLE OF THE MIDAS PROGRAM IS THAT ALL MIDAS SHOPS ARE MUFFLER SPECIALISTS, AND NO SIDE LINES ARE PERMITTED IN SHOPS THAT IDENTIFY THEMSELVES WITH THE MIDAS PROGRAM.
>
> * * *
>
> "* * * any merchandise not carrying the Midas brand. Our policy in this matter is simply one of requiring that those people who are part of the program are part of it all the way. * * * See to it that it is enforced and tell us where it isn't."

On March 31, 1958, Sherman in a memorandum to all "field counselors" stated in part:

> "We now require that all Midas Muffler Shops purchase their Hollywood mufflers from Midas exclusively. This is somewhat overdue since the convention last year, and we have long since prepared our dealers to accept this line as part of their overall participation in the Midas program. Take it from there."

On March 25, 1959, Sherman advised his "field counselors" that the home office had "studied each and every Midas order" as it was processed for shipment in order to "isolate" those dealers who were not purchasing "tail pipes" from defendants. In this memorandum Sherman reiterated defendants' exclusive dealing policy, stating:

> "When a dealer signs a franchise with us he commits himself undeniably to certain basic practices in our program. Paramount among these is his consistent and exclusive purchase of our products. Our dealers have become so dedicated to our mufflers that I believe there is no question on this, but it is possible that some of them regard our tail pipes and our clamps as a kind of afterthought to which 'loyalty' does not apply. You have all been aware of this as you also have been aware of certain tail pipe companies who manufacture short lines of easily produced numbers at discount prices."

The deposition testimony of plaintiffs as well as their answers to interrogatories likewise raise an issue as to their freedom to purchase products other than Midas. Typical is the testimony of Skarupa as to a conversation with a "field counselor":

> "Q. Do you recall the substance of that conversation?
>
> A. Well, I had pointed out to him that I could buy pipes cheaper if I bought through Texas Tailpipe. I could save a considerable amount of money. I could save a considerable amount of money in the year's purchase.
>
> Q. What was his reply?

A. Well, he explained to me that I should know by now that I wouldn't be able to purchase from outside sources because of the fact that I would get my franchise cancelled and he explained to me that others had their franchise cancelled from the purchase of outside products."

Further in response to defendants' motion for summary judgment, the District Court stated:

"Finally, we are convinced that the Midas parts were sufficiently dissimilar in grade and quality from International products so as to justify a price differential under the terms of Section 2 (a)."

In our view, this is another issue which cannot properly be determined on a motion for summary judgment. Certainly the Court's reference to "Midas parts" could not refer to items other than mufflers. There is evidence that tail pipes, exhaust pipes, clamps and other items sold by Midas were indistinguishable from similar items sold by International and by other parties. In fact, Gordon Sherman in his deposition admitted that exhaust pipes, tail pipes and clamps sold by Midas did not bear a trademark or trade name. Defendant Schroeder on interrogatory admitted as much:

"Q. Was the Midas name placed on any of these items by putting the item in a box with a Midas name on it or by attaching a tag with a piece of wire or string during any of the period 1955 through and including 1960?
A. Not to my knowledge."

Plaintiff Ross on deposition testified:

"We could see no purpose, really, in buying pipes of that kind from Midas. There was no quantity discount. There was no freight allowance except the freight allowance when we shipped in larger quantity. Then we got a lower rate.

"There was no insignia on the pipe. Certainly we wouldn't be confusing anybody by selling a pipe from Texas rather than a pipe sold to us by Midas."

Plaintiff Skarupa testified:

> "A. I don't think we can ascribe the word 'Midas' to the tail pipes because they weren't identified as such and people didn't come in asking for Midas tailpipes. There was no guaranty on the tailpipes.
>
> Q. They were not identified as 'Midas' on the boxes were they not?
>
> A. No sir.
>
> Q. They were not?
>
> A. Sir?
>
> Q. They were not?
>
> A. Midas tailpipes were not identified as Midas tailpipes, as you are stating it.
>
> Q. On the boxes in which they were shipped?
>
> A. The tailpipes didn't come in boxes; they came in bundles.
>
> Q. There was no identification of 'Midas' or anything on the bundles?
>
> A. A packing slip which was tied with wire, but that wasn't affixed to the tailpipes."

The District Court further stated:

> "In addition to an undisputed physical difference existing between the two mufflers after January 1, 1959, the uncontroverted facts clearly reveal that the Midas product included in its purchase price a unique lifetime guarantee by the manufacturer, not attached to the International commodity. Such a guarantee, in the opinion of this Court, clearly justifies a differential in price, and with equal clarity, constitutes a dissimilarity in grade and quality."

This reasoning in part is beside the point. The physical difference in the two mufflers, after January 1, 1959, is immaterial. Plaintiffs on brief make this clear. They state:

> "After January 1, 1959, International Parts changed the gauge of steel used in the manufacture of the Midas muffler. Appellees used this change to justify the differential in their guarantee. Appellants' claim, however, is not based on the post-1959 muffler; rather, appellants' claim is based solely on the pre-1959 mufflers which were returned after January 1, 1959, and

which were identical to mufflers returned by their competitors who received a rebate of 100%; appellants received a rebate of only 50%."

There is evidence that there was no physical difference between the mufflers sold by International and those sold by Midas, except for the identification brand, for the years 1955 to 1959, inclusive. This was admitted in the deposition testimony of defendant Schroeder.

It is undisputed, as the District Court points out, that the Midas muffler carried a guarantee good at any Midas muffler dealer wherever located, while the International muffler carried a guarantee good only where purchased. We do not agree, however, that this difference constitutes a "dissimilarity in grade and quality" or that it justifies a difference in price.

We think the rationale employed in *Federal Trade Commission* v. *Borden Co.,* 383 U.S. 637, is applicable. The Court held, as stated in a headnote (page 637):

> "Labels do not differentiate products for the purpose of determining grade or quality under Sec. 2 (a) of the Act, even though one label may have more customer appeal and command a higher price in the marketplace."

Paraphrasing this language, the Midas trade name or trademark does not differentiate its mufflers for the purpose of determining grade or quality, even though its guarantee may have more customer appeal and command a higher price in the marketplace.

Nothing we have said is to be taken as a resolution of any issue of fact. Our sketchy review of the evidence is only for the purpose of showing that there are genuine issues of fact which preclude the disposition of count 3 by summary judgment.

The summary judgment as it relates to counts 1 and 2 of the complaint is affirmed. The summary judgment as to count 3 is reversed and the cause therein stated is remanded for further proceedings.

AFFIRMED IN PART AND REVERSED IN PART.

CUMMINGS, *Circuit Judge* (dissenting in part). I agree with the majority that *Crest Auto Supplies, Inc.* v. *Ero Manufacturing Company,* 360 F.2d 896 (7th Cir. 1966) supports the *in pari delicto* defense to Counts 1 and 2. However, an examination of the briefs filed in *Crest* reveals that *Simpson* v. *Union Oil Co.,* 377 U.S. 13, was not cited to this Court. A close study of the *Simpson* case, including the briefs filed therein, convinces me that the Supreme Court would not accept the *in pari delicto* defense here. As with these plaintiffs, Simpson had freedom of choice "to accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts." He "deliberately and knowingly enter[ed] into [the] contractual obligations" (311 F.2d 764, 768, 769). In *Simpson,* the Ninth Circuit used the *in pari delicto* theory to deny him any recovery. That point was fully briefed in the Supreme Court, which reversed, permitting Simpson to prevail. Therefore, I am forced to conclude that the Supreme Court rejected the *in pari delicto* defense. Judge McLean came to the same conclusion in *Lyons* v. *Westinghouse Electric Corporation,* 235 F.Supp. 526, 537 (S.D.N.Y. 1964), stating:

> "It may be noted that under Simpson v. Union Oil Co., supra, the fact that plaintiffs voluntarily entered into an illegal contract does not in itself bar their recovery. The contract, if illegal, is still an actionable wrong."[1]

In *Simpson,* even Mr. Justice Stewart's dissent agreed that the *in pari delicto* reasoning of the Ninth Circuit was "untenable" (377 U.S. at p. 25). As in *Simpson,* these defendants had the coercive power to terminate plaintiffs'

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[1] Professor Day interprets the *Simpson* case in accordance with Judge McLean's opinion. See 25 ABA Antitrust Section 240 (1964). Other cases disapproving the *in pari delicto* defense in certain situations include *Waldron* v. *British Petroleum Co.,* 231 F.Supp. 72, 91-92 (S.D.N.Y. 1964) and *Mason City Tent & Awning Company* v. *Clapper,* 144 F.Supp. 754, 769-770 (W.D.Mo. 1956). With respect to *Bales* v. *Kansas City Star Co.,* 336 F.2d 439, 444 (8th Cir. 1964), discussed at pp. 11-12, *supra,* these plaintiffs also seem to have "accepted the contract restriction only in business necessity" and not in an effort to help Midas violate the antitrust laws, so that the *in pari delicto* defense would be inapplicable to them under *Bales.* Cf. *Englander Motors, Inc.* v. *Ford Motor Company,* 267 F.2d 11 (6th Cir. 1959); *Alles Corporation* v. *Senco Products, Inc.,* 329 F.2d 567 (6th Cir. 1964).

franchises if plaintiffs did not adhere to the resale price maintenance and exclusive dealing provisions. These plaintiffs wished to buy various parts (tailpipes, clamps, etc.) from competitors of Midas who were selling at lower prices than Midas. If they had been permitted to purchase at these lower prices, they would have been able to lower their prices, as did Simpson.

As stated in *Simpson* (377 U.S. at pp. 16, 17, 18):

> "The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws.
>
> * * *
>
> "The exclusive requirements contracts struck down in *Standard Oil Co.* v. *United States*, 337 U.S. 293, were not saved because dealers need not have agreed to them, but could have gone elsewhere.
>
> * * *
>
> "The interests of the Government also frequently override agreements that private parties make. Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment [here a franchise agreement], no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy. * * * Nor does § 1 of the Sherman Act tolerate agreements for resale price maintenance."

The public policy justifying the denial of an *in pari delicto* defense in a case of this sort was stated as follows with reference to the unclean hands defense raised in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214:

> "If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents

nor immunize them against liability to those they injured."[2]

With respect to the majority's alternative basis discussed at p. 13 *supra*, this record shows that Midas and International held themselves out as separate and "divorced". Therefore, *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, does not permit defendants to claim that as a single business entity they were unable to conspire. Furthermore, under *Simpson v. Union Oil Co.*, 377 U.S. 13, and *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, a conspiracy is not needed to support Count 1.

As to the muffler part of Count 3, defendants have not cited any authorities or legislative history to show that the difference in the Midas and International guarantees makes these physically identical mufflers[3] dissimilar in grade and quality within the meaning of Section 2(a) of the Robinson-Patman Act. Cf. *Federal Trade Commission* v. *Borden Co.*, 383 U.S. 637, with the District Court's opinion herein (1966 CCH Trade Cases at p. 82,710). Therefore, affirmance on this point is not justified.

Except as indicated, I concur in the opinion of the Court.

A true Copy:

Teste:

....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[2] See also *Budget Dress Corp.* v. *International Ladies' Garment Workers' Union*, 25 FRD 506, 508, 509 (S.D.N.Y. 1959); *Trebuhs Realty Co.* v. *News Syndicate Co.*, 107 F.Supp. 595, 599 (S.D.N.Y. 1952).

[3] A different gauge of steel was used in the Midas muffler after January 1, 1959, but plaintiffs have limited their claim to pre-1959 mufflers.

[Appendix C]

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ON PETITION FOR REHEARING*

IT IS ORDERED by the Court that the petition for a rehearing *en banc* of this cause be, and the same is hereby, DENIED.

(Circuit Judges Swygert and Cummings voted to grant the petition for rehearing *en banc*).

[Appendix D.]

SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. 1:

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

SECTION 3 OF THE CLAYTON ACT, 15 U.S.C. 14:

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

SECTION 4 OF THE CLAYTON ACT, 15 U.S.C. 15:

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 731.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 733

PERMA LIFE MUFFLERS, INC.
PERMA LIFE MUFFLERS OF ARLINGTON, INC.
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.
PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.
ROBIN HOOD OF GRAND RAPIDS, INC.
ROBIN HOOD OF MUSKEGON, INC.
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a
ROBIN HOOD MUFFLER SHOP
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a
MIDAS MUFFLER SHOP OF BATTLE CREEK
CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS
PIERCE MUFFLER SHOPS, INC.

APPELLANTS

v.

INTERNATIONAL PARTS CORPORATION
MIDAS, INC.
POWELL MUFFLER CO. INC.
MUFFLER CORPORATION OF AMERICA
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,
ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

APPELLEES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' APPENDIX "E" AND APPENDIX "F"

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APPENDIX "E"

1494 IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 60 C 1636) • •

(Filed May 20, 1966)

MEMORANDUM OPINION

Defendants' Motion for Summary Judgment on Count III.

This is a three-count action arising under the anti-trust laws of the United States. In essence, the complainants charge in Counts I and II that the terms of certain franchise agreements executed by the parties herein to govern their relationship in the purchase and sale of automotive exhaust system parts through establishments displaying defendants' trade and service marks ("Midas" and "Midas Muffler Shop"), illegally restricted plaintiffs in the operation of said shops. It is thus alleged that the corporate and individual defendants herein joined in an illegal conspiracy to restrain trade in violation of Section 1 of the Sherman Act, and have further violated the terms of Section 3 of the Clayton Act. In Count III, it is asserted that defendants violated Section 2 of the Clayton
1495 Act, as amended by the Robinson-Patman Act, by granting discriminations in price and service to certain of their customers without offering or otherwise making available those same prices and services to plaintiffs herein.

On February 25, 1966, this Court granted defendants' motion for summary judgment on Counts I and II, holding that, in the absence of coercion, plaintiffs were *in pari delicto* with defendants, and, thus, unable to maintain the instant action. At the same time we postponed ruling with regard to Count III on plaintiffs' assertion

that interrogatories calling for information relevant to the issues raised therein were objected to by defendants and not answered. The defendants having now supplied the requested information, we may proceed to consideration of defendants' motion.

In support of its motion for summary judgment on Count III, defendants assert that any alleged difference in price or service between purchases by plaintiff of Midas brand exhaust parts and purchases by other persons of Midas or International brand parts from defendant did not constitute a discrimination violative of the Robinson-Patman Act, in that (a) plaintiffs did not compete with oher purchasers of Midas brand parts; (b) plaintiffs had the opportunity to purchase either brand; and (c) the Midas exhaust parts system was unlike the Inter-
1496 national system in grade and quality.

Taking the alleged *intra*-brand discrimination first, i.e. sale of Midas parts to Midas dealers at prices lower than those charged plaintiff for Midas parts, it is clear, under Section 2(a) of the Robinson-Patman Act (Sec. 13, Title 15, U. S. C.) that said statutory provisions apply only where the alleged discrimination is between *competitors*. *Bales* v. *K. C. Star Co.*, (8th Cir., 1964) 336 F. 2d 439; *National Lead Co.* v. *F. T. C.*, (7th Cir., 1955) 227 F. 2d 825, 836; *Borden Co.* v. *F. T. C.*, (7th Cir., 1964) 339 F. 2d 953, 956. Indeed, the late Judge Julius Miner of this Court, on October 16, 1961, ordered plaintiffs herein to amend their complaint so as to properly allege competition with the favored purchasers. Without such allegations, Judge Miner concluded, the complaint was legally insufficient.

Having reviewed the depositions, affidavits, and documents submitted herein, we must hold that no real controversy exists as to the factual elements of this issue,

and that defendants are entitled to summary judgment thereon as a matter of law. That is, each plaintiff has admitted that the geographic "marketing area" in which he sold his Midas products was the "city or county" in which each shop was located, and that no other Midas dealers were located within that region of competi-
1497 tion. (Skarupa, Int. V; Skarupa Dep. pp. 187-88, 302-03; Ross Int. V; Ross Dep. pp. 278-79; Pierce, Int. V; Pierce Dep. p. 334; Wheeler, Int. V; Wheeler Supp. Dep., p. 238; Ross Dep. pp. 402-03.) Thus, it is clear from plaintiffs' own testimony that none of the alleged favored purchasers of Midas brand products operated in or near the marketing area controlled by plaintiffs' shops, and that none of said purchasers were ever in competition with plaintiffs.

Plaintiffs have apparently elected not to contest these facts by affidavit or deposition testimony. Rather they seek to defeat defendant's motion for summary judgment by asserting that competition existed between International Parts dealers and plaintiffs, and, that, indeed, there was no difference in grade or quality between the International muffler and the Midas muffler. While this argument is relevant with regard to the second portion of defendants' motion which concerns "*inter*-brand" discrimination i. e. sale of International brand systems to purchasers at prices more favorable than those extended to plaintiffs in their purchase of Midas products, to be discussed *infra*, it does not contradict defendants' initial contention in any way. That is, defendants have demonstrated that no material fact remains in controversy with regard to intra-brand discrimination between Midas dealers, and that judgment on that issue should be
1498 entered in their favor as a matter of law. Accordingly, summary judgment is granted on Paragraphs 24, 24A and 25 of the Amended Complaint, which para-

graphs deal exclusively with the discriminatory sale of Midas parts alone.

We must then turn to Paragraphs 26 through 31 of the Amended Complaint, in which are alleged facts supporting the remainder of Count III. In said paragraphs, plaintiffs contend that price and service discriminations existed between plaintiffs and purchasers of International products. In defense thereto, and in support of their motion for summary judgment, defendants contend that both Midas and International Brand Products were freely available to plaintiffs at the prices offered others, and that a price differential between the two products was justified by an existing dissimilarity in grade and quality. These two assertions, if proven, would constitute a complete defense to the Section 2(a) allegations at issue.

As the Court of Appeals for the Ninth Circuit stated in *Tri-Valley Packing Assn.* v. *F. T. C.,* (9th Cir., (1964) 329 F. 2d 694, at pp. 703-04, "if the lower price would have been available to the nonfavored buyer . . . the probability of competitive injury due to the fact that the nonfavored buyer paid more . . . is not the result of

> price discrimination, but of the nonfavored buyer's
> 1499 failure to take advantage of the opportunity, equally
> available to him, of buying at the same low prices."

Thus, assuming for the purpose of argument that the International Brand parts were identical to the Midas parts, there could be no discrimination within the meaning of Section 2(a), if plaintiffs were able to purchase the former at the lower price, but elected to pay higher prices for the latter. See also *United Banana Co.* v. *United Fruit Co.,* 1965 Trade Cases Par. 71,522 (D. C. Conn.).

The uncontroverted deposition testimony of plaintiffs clearly demonstrates that prior to the introduction of

the Midas prgram, plaintiffs Ross (Dep. pp. 7, 8, 10, 14, 21, 24, 229-230), Skarupa (Dep. pp. 29, 293) and Pierce (Dep. pp. 11-14, 19, 22) purchased International parts from defendants, and that, indeed, one of them, Pierce, continued to sell such parts from his retail stores during his operation of Midas shops (Dep. p. 47).

While plaintiffs' counsel baldly asserts that plaintiffs could only buy Midas products, it is clear that on a motion for summary judgment, such unsupported contentions cannot effectively refute the sworn deposition testimony of plaintiffs themselves. As our discussion with regard to the coercion issue present in Counts I and II demonstrated, the evidence is clear and uncontrovert-
1500 ed that plaintiffs herein freely elected to sell Midas parts. Whether they were influenced by the guarantee thereon, the "free installation" approach, or the national advertising program is not crucial. What is important, however, is that plaintiffs, well aware of any price differentials that might exist between the two brands, having dealt with International previously, and in one instance having continued to do so, *freely* chose to forego purchases of International parts and to deal exclusively with Midas. They cannot now, with the wisdom of hindsight, declare that they would have done better with International Parts purchases. The evidence is uncontroverted in demonstrating that plaintiffs were free to purchase either product, but chose Midas. No discrimination in a legal sense is present, and defendants are entitled to summary judgment.

Finally, we are convinced that the Midas parts were sufficiently dissimilar in grade and quality from International products so as to justify a price differential under the terms of Section 2(a).

While we are fully aware of the recent holding of the United States Supreme Court in *Borden Co. v. F. T. C.*,

(dec. March 23, 1966) 34 U. S. L. Week, reversing the Fifth Circuit Court of Appeals (339 F. 2d 133), and holding that a difference in grade and quality cannot be established "by a label alone or by the label and its
1501 consumer appeal," we are equally satisfied that the facts before us are not that narrow. In addition to an undisputed physical difference existing between the two mufflers after January 1, 1959, the uncontroverted facts clearly reveal that the Midas product included in its purchase price a unique lifetime guarantee by the manufacturer, not attached to the International commodity. (See defendants' Answer to Interrogatory 10 for provisions thereof.) Such a guarantee, in the opinion of this Court, clearly justifies a differential in price, and with equal clarity, constitutes a dissimilarity in grade and quality.

While we could not preclude plaintiffs from discovery they considered crucially relevant before ruling on defendants' Count III motion, we are satisfied now that Midas trademarks and their validity are irrelevant to the issues raised herein.

Accordingly, the location of defendants for summary judgment in their favor on Count III is granted.

ENTER:

Abraham L. Marovitz
Judge

Dated: May 20, 1966

APPENDIX "F"

1401 In the District Court of the United States

* * (Caption—No. 60 C 1636) * *

(Filed February 25, 1966)

MEMORANDUM OPINION

Motion of defendants for summary judgment.

This is a three-count antitrust action arising under Section 1 of the Sherman Anti-Trust Act (Sec. 1, Title 15, U. S. C.), Section 3 of the Clayton Act (Sec. 14, Title 15, U. S. C.) and Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Sec. 13, Title 15, U. S. C.) In essence, the complainants charge in Counts I and II that the terms of certain franchise agreements executed by the parties herein to govern their relationship in the purchase and sale of automotive exhaust systems parts through establishments displaying defendants' trade and service marks, ("Midas" and
1402 "Midas Muffler Shop") illegally restricted plaintiffs in the operation of said shops. It is thus alleged that the corporate and individual defendants herein joined in an illegal conspiracy to restrain trade in violation of Section 1 of the Sherman Act, and have further violated the terms of Section 3 of the Clayton Act. Finally, in Count III, it is asserted that defendants violated Section 2 of the Clayton Act as amended by the Robinson-Patman Act, by granting discriminations in price and service to certain of their customers without offering or otherwise making available these same prices and services to plaintiffs herein.

Defendants have moved for summary judgment on all counts. Plaintiffs have opposed said requests, and in addition, have moved to strike portions of that motion.

In accordance with our earlier decisions in *Rayco Mfg. Co. v. Dunn,* (D. C. Ill., 1964), 234 F. Supp. 593, and *Crest Auto Supplies* v. *Ero Mfg. Co.,* (D. C. Ill., 1965), 246 F. Supp. 224, we must grant summary judgment in favor of defendants on Counts I and II. We have con-
sistently held that a litigant cannot be heard to com-
1403 plain of injuries which resulted from alleged anti-
trust violations to which it was a *voluntary* party.
We find no cause to alter that principle today.

It is clear from the undisputed facts before us that each plaintiff voluntarily entered into the franchise agreement at issue and accepted the benefits therefrom. They are, under the holdings in *Rayco* and *Crest, in pari delicto* with defendants, and therefore unable to reap the harvest of their own misdeeds. Each plaintiff recognized that the franchise conveyed to him the right to use the various Midas trade names, trademarks and service marks, and each profited from the use of same. They are not now entitled to the high profit of a treble damage suit when they voluntarily acceded to, fostered, and profited from the very practice about which they now complain.

While defendants may well be liable to third parties for antitrust violations, plaintiffs, having participated in the alleged illegal undertaking, may not recover. See *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.,* (7th
Cir., 1943) 138 F. 2d 967, 971; *Pa. Water & Power*
1404 *Co.* v. *Consolidated Gas, Elec., Light & Power Co.,*
(4th Cir., 1953), 209 F. 2d. 131, *cert. den.* 347 U. S.
960; *Kershaw* v. *Kershaw Mfg. Co.,* (D. C. Ala., 1962) 209 F. Supp. 447, 454, *affd.* (5th Cir., 1964) 327 F. 2d 1002.

Plaintiffs' cases in rebuttal may all be distinguished. In *Ring* v. *Spina,* (2d Cir., 1945) 148 F. 2d 647, *Mande-*

ville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U. S. 219 (1961); *Bales* v. *K. C. Star*, (8th Cir., 1964) 336 F. 2d 439; *Emich Motors Corp., et al.* v. *General Motors Corp.*, 340 U. S. 558 (1951); *Lessig* v. *Tidewater Oil Co.*, (9th Cir., 1964) 327 F. 2d 459, *cert. den.* 377 U. S. 993 (1965); and *Osborn* v. *Sinclair Refinishing Co.*, (4th Cir., 1960) 286 F. 2d 832, the plaintiffs all entered into agreements as "a result of coercion," "in a context of coercion," or because of "coercive conduct on the part of respondents."

In *Rayco, Crest*, and, *a fortiori*, in the instant case, there has been no showing whatsoever of coercion, economic or otherwise. The depositions of the individual plaintiffs, quoted from in defendants' brief, and uncontraverted except by counsel's arguments, reveal that
1405 each plaintiff signed franchise agreements freely and voluntarily "as a way of making some real money," (Ross, Dep. pp. 238-240); "So I could reap the benefits of such development," (Skarupa Dep. p. 30); "so as not to invite competition," (Pierce, Defendants' App. 19); because "I was looking for something to get into . . . I answered the ad," (Wheeler Dep. p. 7). It is further undisputed from the record before us that each plaintiff sought to expand his market area after initially gaining a franchise, sought to obtain additional franchises thereafter, and sought to create a monopoly for themselves and defendants within specified territorial limits. Further, each plaintiff retained ownership or control of the premises at which his muffler shop was located, paid no franchise fee to defendants, and was able to terminate the agreement unilaterally on thirty days' notice. Under no circumstances could "coercion" be said to have been a factor herein.

The remainder of plaintiffs' cases were distinguished previously in our earlier opinions on the ground that the

only defense relied on therein was "unclean hands."
1406 That is, in the cited cases the mere fact that a plaintiff had himself violated the antitrust laws, independently of defendant, did not suffice to bar maintenance of the suits. However, when that violation is *in conjunction* with defendant, as here, plaintiff is a party to the illegal arrangement complained of, is *in pari delicto* with defendant, and may not invoke the aid of the law. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U. S. 211, (1951); *Moore v. Mead Service Co.,* 340 U. S. 941 (1951); *Trebuhs Realty Co. v. News Syndicate Co.,* (D. C. N. Y., 1952) 107 F. Supp. 595.

We have repeatedly held that a person who freely assents to an act suffers "no legal injury" if harm results therefrom. We are thus satisfied on the papers presented to us that no genuine factual controversy exists, and that defendant is entitled to summary judgment as a matter of law on Counts I and II.

While we need not base our decision thereon in view of the foregoing discussion, we further hold from the undisputed facts before us (contested inadequately under Rule 56 by Counsel's briefed arguments alone) that
1407 the corporate and individual defendants were a single business entity through which a family business was operated, and that, therefore, as a matter of law, no conspiracy existed among them in violation of Section 1 of the Sherman Act.

It is clear from the Complaint that each individual defendant is alleged to be "an officer and/or employee and/or agent of one or more of the corporate defendants (Para. 10, Amended Cmplaint), and that each corporation is alleged to be a "wholly-owned subsidiary" of International Parts (Para. 11). It is equally clear that the

acts of a corporation's agents are in law the acts of the corporation, that a corporation cannot act except through its agents, and that a corporation cannot conspire with itself. Accordingly, each individual defendant when acting as a corporate agent in his normal employment capacity, could not be involved in a conspiracy with the other individual defendants or the corporation itself. *Nelson Radio & Supply Co.* v. *Motorola* (5th Cir., 1952) 200 F. 2d 911, 914:

> "Surely discussions among those engaged in the management, direction, and control of a corporation
> 1408 . . . do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act."

There is no indication that the acts of the individual defendants herein were otherwise. Further it is apparent that the multiple corporations before us constituted in fact a single corporation. While we agree with plaintiff that subsidiary corporations may under certain circumstances "conspire" to violate the antitrust laws, the record before us indicates by uncontested facts that no such conspiracy was present here.

The affidavits of Nathan Sherman and Gordon Sherman, chief executives of the defendant corporations, reveal that the manufacture and sale of exhaust system parts at issue, while operated through a multi-corporate structure, was a single business entity. That is, International Parts sold all the products involved herein. Midas, Inc., acted as a corporate shell owning all trade names, trademarks, service marks and franchise agreements. Muffler Corp. of America handled manufacturing for its parent, and Powell Muffler Co., served
1409 as a distributing subsidiary.

There is no evidence, except in plaintiffs' unsupported arguments that these corporations competed with

each other or acted in any manner other than as a single integrated busiiness. There are no acts alleged which could not have been done by a single corporation acting alone. Plaintiffs may not by mere pleading allegations and conclusions fragmentize a unified business to meet the conspiracy requirements of the Sherman Act.

Inasmuch as plaintiffs have failed to counter the joint affidavit of Nathan and Gordon Sherman, or the depositions of the plaintiffs indicating that they have no knowledge of facts to support the conspiracy allegations of the Complaint, we must grant summary judgment as to the Sherman Act allegations on this ground as well.

Defendants finally assert that summary judgment should be granted on Counts I and II because the franchise agreement and the merchandising methods employed by defendant in connection therewith were reasonable and legal means to protect the Midas trade names, trade-
1410 marks and service marks licensed to plaintiffs, and
on Count III because there were no discriminations in price or service between plaintiffs and other purchasers in the absence of requisite competition between purchasers, and the requisite identity of commodities of like grade and quality.

Plaintiffs have moved to strike these arguments on the grounds that defendants have refused discovery as to the factual data underlying the trade and service marks which they now seek to use in support of their summary judgment motion. More specifically, it is alleged that defendants, having objected to answering plaintiffs' Interrogatory No. 34, dealing with certain trademarks owned by defendant, and having prevailed on the Court to sustain said objection on the ground that trademarks were not relevant to this action, cannot now rely on a trademark defense in their motion for summary judgment.

We must sustain plaintiffs' motion. While the significance of defendants' trademarks relating to automotive exhaust systems was most speculative on December 18, 1964, when this Court sustained defendants' objec-
1411 tions, it is apparent now that plaintiffs are entitled to discovery thereon. Summary judgment is a strong remedy, to be applied with great restraint only upon a clear showing that no material facts are in genuine controversy. Where a party has been denied discovery in what later appears to be a critical area, especially on defendants' representation that said area is irrelevant, it cannot be said that the facts have been sufficiently developed to merit summary judgment consideration.

We shall therefore deny summary judgment on Count III of the Complaint at this juncture, without prejudice, require defendants to answer Interrogatory 34(a), (b) and (c) dealing with automotive exhaust parts, within ten days, and permit defendants, if they so desire, to refile the instant motion thereafter. It must be noted, however, that the foregoing does not in any way affect the judgment we have this day ordered in favor of defendants on Counts I and II.

ENTER:

Abraham L. Marovitz,
Judge.

Dated: February 25, 1966.

No. 733

In the Supreme Court of the United States

October Term, 1967

PERMA LIFE MUFFLERS, INC.; et. al.,
Petitioners,

vs.

INTERNATIONAL PARTS CORPORATION; et. al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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November 1967

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In the
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BRIEF IN OPPOSITION

THE COURT HAS NO JURISDICTION

The judgment of the court of appeals was entered on April 25, 1967 and a petition for rehearing *en banc* was denied on June 7, 1967. Orders entered by this Court on August 30 and October 2, 1967 extended the time to file the petition for a writ of certiorari to October 3 and October 17, respectively. The petition was presented to the Clerk on October 17, 1967, along with certified copies of the plaintiffs'[1] and defendants' appendices in the court

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[1] Throughout this brief, petitioners are referred to as "plaintiffs" and respondents as "defendants."

of appeals. However, "the certified record required by Rule 21" was not presented at that time nor had it been filed as of November 6, 1967, more than 150 days after the denial of the petition for rehearing by the court of appeals.

Rule 22-3 of the Court's Rules,[2] effective October 2, 1967, requires that the petition "and the certified record required by Rule 21" be filed "within the time prescribed by law." Section 2101(c) prescribes that in cases of this type, the petition for a writ of certiorari must be filed within 90 days and that such time cannot be extended beyond an additional 60 days (28 U.S.C. 2101(c)). Rule 21 of the Court's Rules necessitates that "[t]he entire record in the court" below be filed unless otherwise agreed. There has been no such agreement. Plaintiffs' failure to file the certified record with the petition within the statutory period deprives the Court of jurisdiction. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923); *Rust Land Co.* v. *Jackson*, 250 U.S. 71, 76 (1919).

QUESTIONS PRESENTED

If this Court determines that it has jurisdiction, the petition presents only one main question: Should this Court grant a writ of certiorari to review the particular undisputed facts of a private antitrust treble damage claim to determine whether the courts below correctly applied the established defense of *in pari delicto?*

Subsidiary questions include:

1. Was the court of appeals correct in affirming, on the basis of the doctrine of *in pari delicto*, the judgment of the district court dismissing, on defendants' summary judg-

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[2] Pertinent provisions of the statute and rules are set forth in Appendix A, *infra*, pp. App. 1, App. 2.

ment motion, two counts of plaintiffs' antitrust treble damage complaint where the undisputed facts in the record show that the plaintiffs: (a) entered into Midas franchise agreements voluntarily, solemnly, and without coercion; (b) thereafter eagerly requested and were granted additional Midas franchises; (c) at all times voluntarily acceded to, fostered, and participated fully with the defendants in the promotion of the Midas program; (d) during their three or four year association with Midas, profited to the extent of hundreds of thousands of dollars from the very program now claimed to have been violative of the antitrust laws; (e) unilaterally exercised the ever-present right to terminate the Midas franchise on 30 days' notice only when a competitor of Midas offered what plaintiffs believed to be a more financially attractive franchise arrangement; and, (f) then, brought this action, not to recoup financial business losses suffered while acting as Midas franchisees, but to claim additional profits which they alleged might have been made in the Midas shops they did open, and to also claim additional profits which allegedly might have been made in shops they did not open because the defendants would not grant them even more allegedly illegal franchises?

2. Was the court of appeals correct in affirming the dismissal of Count One of the complaint upon the alternative ground that the individual and corporate defendants constituted a single business entity?

RULES AND STATUTES INVOLVED

The pertinent portions of Rules 21 and 22 of this Court, of Rule 56 of the Federal Rules of Civil Procedure and of Section 2101(c) are set forth in Appendix A hereof, pp. App. 1, App. 2, *infra*. The other statutes involved are set forth in Appendix D to plaintiffs' petition.

STATEMENT OF FACTS

The material and undisputed facts upon which the lower courts relied and which are recited in detail in the opinion of the court of appeals (CAO B 3-9) were taken from the plaintiffs' own testimony in depositions and interrogatory answers (D. App. 53-109) and from an unchallenged affidavit of defendants' principal executives (D.App. 41-49).[3]

The plaintiffs are ten corporations and individual proprietorships, but, in essence, are four individuals—Gregory Skarupa, Maxwell Ross, Joseph Pierce and Claude Wheeler—who, after being licensed under a franchise agreement with defendants, used the "Midas" and "Midas Muffler Shops" trade name, trademarks and service marks in operating such shops in various states. Defendants are International Parts Corp., three of its subsidiary corporations, plus six individual officers or agents of the corporate defendants. These ten technically separate legal persons constituted the single entity by which Nathan Sherman and his son, Gordon Sherman, conducted their family-owned business (D. App. 41-44).

MIDAS HISTORY[4]

Prior to defendants' introduction of the Midas merchandising concept and franchise plan in late 1955, exhaust parts were sold to consumers from retail outlets, such as

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[3] The court of appeals' opinion is cited "CAO" followed by the page number of plaintiffs' Appendix B; the district court opinion is cited "DCO" followed by the page number of plaintiffs' Appendix E or F; the petition for certiorari is cited "Pet." Defendants' appendix in the court of appeals is cited "D. App." while the Appendix attached hereto is cited "App." Emphasis within quotations is supplied unless otherwise noted.

[4] The complete and undisputed history of the Midas franchise program is set forth in the affidavit of Nathan and Gordon Sherman which is reprinted in full in defendants' appendix in the court of appeals (D. App. 41-49).

garages and service stations, and were merchandised like most automotive replacement parts; they received no individual attention, enjoyed no consumer brand consciousness, and were sold subject to a labor installation charge (D. App. 43-44).

Midas changed this with its nationally advertised trade name, nationwide chain of specialized exhaust system shops, free installation, and a unique guarantee to replace a worn-out muffler at any Midas Shop throughout the nation. A network of franchised dealers — each of whom owned his own retail outlet identified by the "Midas" trade names and service marks — invited the public to a chain of shops specializing in exhaust parts. The typical dingy auto repair shops were replaced by the Midas atmosphere of cleanliness, comfort and prompt, courteous service (D. App. 44-46).

Success for this merchandising concept, and for each Midas dealer, necessitated that the motorist recognize the Midas name and have confidence that each dealer was an exhaust specialist, handled the same quality product, gave the same prompt and dependable service, and honored the same unique Midas guarantee. Millions were spent by defendants and the Midas dealers in national and local advertising of this image (D. App. 46, 84-85).

No franchise fee, prototype building, or purchase or lease of capital equipment or real estate from Midas was required. A franchise agreement licensing the use of the trademark "Midas" and the service mark "Midas Muffler Shop" was tendered to each prospective dealer.[5]

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[5] One Midas trademark licensed by the agreement covered "Mufflers for internal combustion engines and parts thereof — namely, tail pipes, exhaust pipes, and muffler clamps". A service mark covered "Inspection of automotive exhaust systems and installation of automotive mufflers and exhaust system parts" (D. App. 110-111).

It was cancelable by either party on thirty days' notice with no restrictions on the dealer's activities thereafter (D. App. 47). Virtually every dealer enjoyed substantial monetary gains from participation in the Midas program; and, after obtaining their first Midas franchise agreement, most dealers, as did all the plaintiffs, subsequently sought and were granted franchises for additional shops (D. App. 49; App. 56-57, 64-65, 72, 78-79).

PLAINTIFFS' PARTICIPATION IN THE MIDAS PROGRAM[6]

Although plaintiffs operated in separate areas, had different pre-Midas business experience and were previously unacquainted with each other, a remarkable similarity existed in their total involvement in the Midas program during the 1955-1959 span of plaintiffs' relationships with defendants.

Plaintiffs Skarupa and Wheeler sought out defendants, learned about the franchise provisions, and promptly opened shops (App. 54-55, 77-78). Plantiffs Pierce and Ross, who then were selling automotive parts, investigated the Midas program and joined "so as not to invite competition" and because it was "a way of making some real money" (App. 71-72, 63-64; D. App. 95, 98). Immediate profits resulted from these original shops[7] and each

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[6] The complete facts on each plaintiff's entry and participation in the Midas program were set forth in the trial court Appendix, a narrative and chronological summary of thousands of pages of plaintiffs' deposition and interrogatory testimony which is attached hereto in Appendix B, *infra*, pp. 51-83. Not one statement in this Appendix was ever challenged by plaintiffs throughout these proceedings (CAO B-3).

[7] See Argument, *infra*, p. 21 for the profits plaintiffs received from their participation in the Midas program.

plaintiff, now more aware of the unchanged franchise provisions and actually experienced in the program, sought additional franchises. Within two years, Skarupa expanded to four Midas Shops in the Washington, D.C. area (App. 56-57). Ross from a home base in Muskegon, Michigan, signed five more franchises, including two in a temporary expansion to Minneapolis, a distant but "larger metropolitan area" which he wanted; eventually he opened his fourth shop in Michigan almost four years after his first franchise (App. 64-65; D. App. 93). In the fourteen months following Pierce's first franchise, he expanded to six Midas Shops in five central New York cities; he also inquired about additional franchises in other cities and finally opened a seventh Midas Shop without asking for a franchise (App. 71-72). Wheeler "wanted to expand" in the St. Louis area, he didn't want "just the one franchise," and within nine months he had opened two additional shops; his last Midas shop was opened almost three years after his original agreement (App. 78-79; D. App. 103).

Eventually, plaintiffs had twenty shops, each bearing the name "Midas Muffler Shop," and displaying Midas advertising. Defendants' national advertising in each plaintiff's market along with plaintiffs' local advertising identified these shops with the national Midas image of exhaust system specialists.[8] Only ten dealers per year were on the National Advisory Council of leading Midas dealers; yet, each plaintiff was a member. Plaintiffs contributed ideas in support of the Midas program through speeches at dealers' meetings and articles in the dealers' magazine and actively encouraged others to become Midas dealers (App. 58, 66, 73, 79).

[8] See Argument, *infra*, p. 20.

When plaintiffs decided to cancel their franchises, they continued without interruption to sell exhaust parts from the same locations.[9]

For over a year, Wheeler waited to see what was going to be done with "a new Midas franchise in St. Louis"; when this franchise went to a new dealer, Wheeler terminated his Midas franchises, signed a competitor's exclusive franchise for a larger area, but would have returned to Midas if he had been granted the "exclusive" Midas franchise he demanded (App. 80-81).

For six months, Pierce considered "a change," to a competitive product, meanwhile using Midas Shops to sell another brand muffler with a Midas-type guarantee under conditions which he admitted did not make the customer aware of what he was receiving, and then Pierce terminated one of his seven franchises; when Midas exercised its right and terminated the remaining franchises, Pierce wrote that he was willing "to co-operate fully" in this termination (App. 74-75; D. App. 108).

After defendants did not concur in Ross' plans to further expand, he terminated his Midas franchises and signed a competitor's exclusive franchise for Michigan only five months after his last Midas franchise had been executed (App. 66-67).

Skarupa wanted three more Midas Shops; when he was offered only one and told that additional shops would go

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[9] As plaintiffs acknowledge, competitive franchise programs were available after Midas was introduced (Pet. 27). Upon terminating Midas, plaintiffs joined the Robin Hood franchise program which was sponsored by the Maremont Corp., a competitor of International Parts; a former Midas employee was the program's chief sales executive and solicited plaintiffs to join that program (App. 59, 67, 75, 80).

to other dealers, he terminated his Midas franchises and signed a competitor's exclusive franchise for his marketing area (App. 58-60).

This eagerness for still more franchises in order to further participate in and benefit from the Midas program continued up to the moment plaintiffs terminated their agreements. The amended complaint even seeks damages for defendants' refusal to accede to plaintiffs' repeated requests "to expand the area of their business" and "to increase the number of retail outlets which they operated. . . ." (D. App. 26).

In its opinion the court of appeals succinctly summarized the facts and the result which necessarily follows from such facts:

> "In resume', each plaintiff initially asked to become a participant in the Midas merchandising program and voluntarily, willingly and knowingly executed his first Midas franchise agreement. Each plaintiff thereafter eagerly sought additional shops in the Midas program and voluntarily executed additional franchise agreements for such shops. Each plaintiff at all times had the legal right to abandon the Midas program and to cancel these franchise agreements on 30 days' written notice. Three of the instant plaintiffs unilaterally terminated their franchises when it suited their convenience and the fourth acquiesced in the termination of his franchise. Furthermore, each plaintiff cooperated with defendants and all other Midas dealers in the conduct which plaintiffs now assert was illegal and injurious to their business and property. Each plaintiff accepted the benefits arising out of the franchise agreements and earned substantial and significant profits during the terms of such agreements. Each plaintiff sought to perpetuate the 'wrong' of which he now complains by acquiring additional franchises, and

Skarupa makes the contradictory claim that he is entitled to damages not only because of the 'wrong' he suffered while a party to and operating under franchise agreements but also because additional franchises which he sought were denied. Presumably, he was so well satisfied with the ill treatment which defendants assertedly imposed upon him that he sought the opportunity to suffer more of the same treatment.

It would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine. We hold that it was properly applied and given effect by the District Court." (CAO B 12-13)

REASONS FOR DENYING CERTIORARI

Both the trial court and the court of appeals carefully reviewed the entire record and applied the long recognized and well established defense of *in pari delicto* to the undisputed facts. In substance, the courts below determined that plaintiffs freely, voluntarily and without coercion participated in and profited from the very activities claimed to be violative of the antitrust laws. Hence, the lower courts left the parties where they found them and refused to permit plaintiffs to use the courts to obtain any further fruits from the bargain alleged to be illegal.[10]

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[10] Throughout the petition, plaintiffs make the unwarranted assumption that the Midas franchise agreement was a *per se* violation of the antitrust laws, that defendants had no right to limit plaintiffs' use of the "Midas" trademarks and the "Midas Muffler Shop" service marks, and that plaintiffs after signing a franchise and becoming a part of the program, nonetheless had the right to operate a Midas Muffler Shop as an alley mechanic's shop, installing both general automotive parts and non-Midas exhaust system parts despite the public's reliance on the Midas name and the Midas guarantee for Midas quality. Such premises are unfounded. The conditions governing the operations of a Midas Muffler Shop, were reasonable and necessary, as a matter of law, to assure the American motorist that he would find the products and services which the Midas advertising, in which plaintiffs participated, represented would be obtained at a "Midas Muffler Shop." See *Susser* v. *Carvel Corp.*, 206 F.Supp. 636 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505, 516-17 (2d Cir. 1964), *cert. granted*, 379 U.S. 885, *cert. dis. as improvidently granted*, 381 U.S. 125 (1965); *Carvel Corp.*, [1965-1967 Transfer Binder], Trade Reg. Rep. ¶17,298 (FTC 1965); *Engbrecht* v. *Dairy Queen Co.*, 203 F.Supp. 714, 719-20 (D. Kan. 1962). The issue of the reasonableness of the Midas franchise plan was included in defendants' original motion for summary judgment (D. App. 38-39), but not ruled upon by either court below (CAO B-14). Since the *in pari delicto* defense would apply even if the program were illegal, defendants are not arguing the matter at this time except to note plaintiffs' unwarranted characterization of the program.

This case does not involve an important question of Federal law nor does it present a decision in conflict with applicable decisions of this Court or of any other court of appeals. The decision below represents a clearly correct application of the principle of *in pari delicto* to the facts of the case and does not warrant review by this Court.

I. The In Pari Delicto Defense Is Well Established In Antitrust Cases.

Recognition by the Court of *in pari delicto* as a valid defense in cases involving restraints of trade antedates the Sherman Act. In *Gibbs* v. *Baltimore Gas Co.,* 130 U.S. 396, 406, 412 (1889), a plaintiff was denied payment for his illegal settlement of a dispute between competitors because the rule is " '. . . of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain' " (130 U.S. at 412).[11] After the passage of the Sherman Act in 1890, the Court approved the defense in *Harriman* v. *Northern Securities Co.,* 197 U.S. 244 (1905) stating that to permit recission of an illegal sale by one with knowledge of the facts and the statute would be "in defiance of the settled rule that property delivered under an illegal contract cannot be recovered back by any party *in pari delicto.*" (197 U.S. at 295).

After the enactment of the Clayton Act in 1914, the *in pari delicto* defense was recognized with approval in *Eastman Kodak Co.* v. *Southern Photo Co.,* 273 U.S. 359 (1927):

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[11] See also *Armstrong* v. *Toler,* 11 Wheat. 258, 271-72 (1826); *Coppell* v. *Hall,* 74 U.S. 542, 558-59 (1868); *Hanauer* v. *Doane,* 79 U.S. 342, 349 (1870); *Thomas* v. *City of Richmond,* 79 U.S. 349, 355 (1870); and Pomeroy, *Equity Jurisprudence,* (4th ed.) §402.

"[If the plaintiff] had not merely bought goods from the defendant because of a business necessity, but, with a knowledge of the defendant's purpose to monopolize, had knowingly and willfully helped to build up the monopoly, it was *in pari delicto,* and hence could not recover . . . ." (273 U.S. at 377).

During this same period of time the doctrine was also uniformly recognized and judiciously applied by many courts of appeals and district courts in antitrust cases. Courts of the Second, Third, Seventh and Ninth Circuits refused to allow a party to an antitrust violation to recover treble damages from fellow participants, reasoning generally that if a party "joined in . . . the alleged unlawful combination . . . , acquiesced for a long term of years in [it] . . .; accepted and enjoyed the profits . . . from it," then he "was precluded from asserting a right of action based upon" the combination's acts. *Bluefields S. S. Co.* v. *United Fruit Co.,* 243 Fed. 1, at 18 (3rd Cir. 1917), *dismissed on stipulation,* 248 U.S. 595 (1919).[12]

Despite the foregoing authority, plaintiffs argue that some of the decisions of this Court beginning with *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons Inc.,* 340 U.S. 211 (1951) and ending with *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964) have abolished this firmly established defense (Pet. 8-25). This Court has never so held. What

[12]Accord: *Eastman Kodak Co.* v. *Blackmore,* 277 Fed. 694, 699 (2d Cir. 1921); *Connecticut Importing Co.* v. *Frankfort Distilleries,* 101 F.2d 79, 81 (2d Cir. 1939); *Victor Talking Machine Co.* v. *Kemeny,* 271 Fed. 810, 816 (3rd Cir. 1921); *Tilden* v. *Quaker Oats Co.,* 1 F.2d 160, 166 (7th Cir. 1924); *First National Pictures* v. *Robison,* 72 F.2d 37, 40 (9th Cir.), *cert. denied,* 293 U.S. 609 (1934); *Morny* v. *Western Union Telegraph Co.,* 40 F.Supp. 193, 200-01 (S.D.N.Y. 1940), and *Mid-West Theatres Co.* v. *Co-Operative Theatres,* 43 F.Supp. 216, 224 (E.D. Mich. 1941).

those decisions do hold is (1) that the *in pari delicto* defense does not apply unless both plaintiff and defendant were engaged in the identical alleged violation, and (2) that it does not apply if one of the parties to the assertedly illegal agreement had been "coerced" into participation.

If a plaintiff has in no way profited from, fostered or participated in a defendant's alleged violations, this Court has understandably refused to allow a defendant to interject as a defense an irrelevant charge that a plaintiff has been involved in an unrelated and independent antitrust violation. Such a defense, attempting to utilize the equitable doctrine that he with unclean hands must go without day, was rejected in *Kiefer-Stewart* (Pet. 10, 12) where the defense was based on a price fixing conspiracy among plaintiffs which had nothing to do with alleged horizontal price fixing between defendant manufacturers. The same result occurred in *Moore* v. *Mead Service Co.*, 340 U.S. 944, 945 (1951), reversing 184 F.2d 338 (10th Cir. 1950), second opinion, 190 F.2d 540 (10th Cir. 1951), *cert. denied*, 342 U.S. 902 (1952) (Pet. 10, 20) where allegations of a unilateral attempt to monopolize by plaintiff were not a defense to defendant's alleged price discriminations.

This Court did not even discuss the *in pari delicto* defense in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964) and that decision is not authority for plaintiffs' contention that this established antitrust defense was there abolished. Clear evidence that the Court intended no such result is the express limitation of its holding to its particular facts:

> "*We intimate no views on any other issue;* we hold only that resale price maintenance through the present, *coercive* type of 'consignment' agreement is illegal . . . ." (377 U.S. at 24).

At best, *Simpson* and the other similar cases cited by plaintiffs (Pet. 9-10) are only authority that a defendant's "coercive" conduct precludes application of the *in pari delicto* defense, a principle to which defendants do not except. However, the non-coercive factual setting in the present litigation completely distinguishes this case from those authorities.[13] And where there is no coercion, the cases, both before and after *Simpson* and *Kiefer-Stewart*, uniformly sustain the defense. In more recent years Courts of Appeals for the Fourth, Fifth and Eighth Circuits have joined those of the Second, Third, Seventh and Ninth cited above in note 12 in recognizing its validity.[14]

As noted by the court below, and by the Third Circuit in an earlier opinion, this Court's silence as to *in pari delicto* in both *Simpson* and *Kiefer-Stewart* is certainly not sufficient authority "to annihilate a principle so long embedded in the law."[15] Likewise, plaintiffs' other

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[13] See Argument, *infra*, pp. 16-19.

[14] *Pennsylvania Water & P. Co.* v. *Consolidated G. E. L. & P. Co.*, 209 F.2d 131, 133-34 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954); *Kershaw* v. *Kershaw Mfg. Co.*, 209 F.Supp. 447, 454 (M.D. Ala. 1962), *aff'd*, 327 F.2d 1002 (5th Cir. 1964); *Bales* v. *Kansas City Star Co.*, 336 F.2d 439, 444 (8th Cir. 1964). It was also applied in *H. & A. Selmer, Inc.* v. *Musical Instrument Exch.*, 154 F.Supp. 697, 698-99 (S.D.N.Y. 1957); *Lehman Trading Corp.* v. *J & H Stolow, Inc.*, 184 F.Supp. 21, 23 (S.D.N.Y. 1960); *New York Credit Men's Adjustment Bureau* v. *Bruno-New York, Inc.*, 120 F.Supp. 495, 498 (S.D.N.Y. 1954); *John J. & Warren H. Graham* v. *Triangle Publications, Inc.*, 233 F.Supp. 825, 832 (E.D. Pa. 1964); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896, 900 (7th Cir. 1966).

[15] CAO B-10; *Pennsylvania Water & P. Co.* v. *Consolidated G. E. L. & P. Co.*, 209 F.2d 131, 133-34 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954).

authorities do not even discuss *pari delicto,* let alone purport to abolish it as an antitrust defense.[16]

Accordingly, the question here becomes simply one of whether the court below correctly applied the established doctrine to the undisputed facts, an issue not worthy of this Court's review, particularly when the facts here are so clearly distinguishable from those in the plaintiffs' authorities and so favorable to the application of *in pari delicto* as is more fully developed in the following section.

II. The Facts Of This Case Make The Defense Of In Pari Delicto Particularly Appropriate.

A. Plaintiffs' conduct here belies any assertions of "coercion" by defendants.

The differences between the facts in this case and those of plaintiffs' authorities conclusively dispose of plaintiffs' efforts to equate this case with *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964) and similar cases based on "coercion" of the franchisee (Pet. 16-17). The "coercion" in law sufficient to vitiate the *in pari delicto* defense takes many

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[16] The *pari delicto* issue was specifically excluded from consideration in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219 (1948) (Pet. 10, 19-20) by the opinion of the court of appeals, 159 F.2d 71, 72 (9th Cir. 1947) which was reversed by this Court solely on the question of intrastate commerce without any mention of *in pari delicto. Bruce's Juices, Inc.* v. *American Can Co.,* 330 U.S. 743, 751-55 (1947) (Pet. 21) held that a purchaser cannot avoid payment for goods he obtains because of the seller's unrelated antitrust violation. *In pari delicto* was not discussed in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656, 657 (1961), *Radovich v. National Football League,* 352 U.S. 445, 447 (1957) and *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 210 (1959) (Pet. 10, 19); the first two arose on sustained motions to dismiss, not summary judgments, and the latter was concerned with a substantive law question.

forms and depends upon the economic setting or facts of the particular case. As in *Simpson* and other cases, "coercion" may result from tying a lease of land or equipment to the sales or license agreement so that when either one is cancelled, the dealer finds himself completely out of business; or, "coercion" may come from the disparity in size and thus of bargaining power between the parties.[17] Or, as in *Bales* v. *Kansas City Star Co.*, 336 F. 2d 439, 441-42, 444 (8th Cir. 1964) (Pet. 9, 22, 25, 26, 29), it may be "coercion" when plaintiffs have no alternative to dealing with defendant if they want to stay in business."[18]

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[17] *Simpson* v. *Union Oil Co.*, 377 U.S. at 21; *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 368 (1965); *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 467-69 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832, 841 (4th Cir., 1960), *cert. denied*, 366 U.S. 963 (1961), second opinion, 324 F.2d 566, 573 (1963). In *Shell Oil Co.* v. *F.T.C.*, 360 F.2d 470, 487 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967), the court explains:

> "The inherent leverage a major oil company has over its dealers results from the market structure of the industry and the special dependence on the company of the service station dealer (who is usually also a lessee)."

Midas, which introduced its new and different program in the auto parts field in 1955 and by 1959 had total sales of $7,500,000 and 268 dealers throughout the United States, is not comparable to Union Oil with sales substantially in excess of $347,900,000 and with 3,305 gas stations in just ten states.

[18] However, that court made clear that, absent coercion, *pari delicto* will apply:

> "Of course, if the plaintiffs actually were in pari delicto with the defendants in the alleged endeavor of the Star to prevent competition . . . , the law should leave them where it finds them." 336 F.2d at 444.

But, as both courts below found, "coercion" is not "a factor herein" (CAO B-9) nor are any of the above "coercive" factors present. There were no leases or equipment purchases tied to the license or sales agreements here (Statement, *supra*, p. 5). Obviously, there were also available alternatives to doing business with the defendants here since all the Midas plaintiffs continued in business after they terminated their Midas franchises; indeed, Skarupa even advertised "I'm still doing business at the same old stands" (D. App. 106). Nor is there any "coercion" by virtue of disparities in size or bargaining power.[19] Plaintiffs' strength here is demonstrated by their unilateral total cancellation of Midas and uninterrupted continuation in business from the same locations (App. 59-60, 67-68, 74-75, 79-81) without changing "the physical facilities in any way other than to change the signs and that type of thing" (D. App. 101). This action of plaintiffs here is in marked contrast to that of the dealers in plaintiffs' authorities: Simpson, Osborn, and Lessig had each been unilaterally cancelled by the defendant, Bales was attempting to have his contract changed, and all of them were desperately trying to hold on to their agreements in order to stay in business.[20] But it was Midas in this case whose chief executive even made a special trip to St. Louis in an unsuccessful effort to keep the dealer, Wheeler, in the program (App. 80-81).

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[19] Plaintiffs' assertions here as to defendants' size and rank in the sale and distribution of "automotive exhaust parts for the replacement market" (Pet. 6) are unreliable both as to their source and because they exclude the shares in that "market" of competitive automobile dealers and other agencies of original equipment manufacturers.

[20] *Simpson* v. *Union Oil Co.*, 377 U.S. at 15; *Osborn* v. *Sinclair Refining Co.*, 286 F.2d at 834; *Lessig* v. *Tidewater Oil Co.*, 327 F.2d at 463; *Bales* v. *Kansas City Star Co.*, 336 F.2d at 441.

Finally and conclusively, it is impossible to reconcile plaintiffs' actions here in eagerly grasping for more and more franchises almost four years after the first one had been signed (Statement, *supra,* pp. 6-7), with any belated claim of coercion of the plaintiffs.

B. The decisions below are consistent with antitrust policy and do not exempt the franchise system from private antitrust enforcement.

The courts below decided only that in this case, given these facts, these plaintiffs (not a vast group of franchisees (Pet. 23-24)) should not recover for the alleged illegalities claimed to inhere in the Midas franchises. The decisions do not "constitute a privately created exemption" for all "franchisors" from Section 4 of the Clayton Act (Pet. 17), nor do they deny the "benefits of the antitrust laws" to one of the very classes they "were designed to protect" (Pet. 21-22). And the reasons for barring these plaintiffs were peculiar to this particular case only, not to franchises generally, and they applied here not merely because plaintiffs in the first instance had "solemnly subscribed" to a Midas franchise agreement (Pet. 8-9), but because of a course of conduct which continued for almost four years and was terminated only when plaintiffs decided to join forces with a Midas competitor.

With full knowledge as to its terms, each plaintiff signed his initial Midas franchise; then with personal experience as to the actual operation of the Midas program during a four-year period, these plaintiffs continued to subscribe to a total of fourteen additional franchises at a time when they could, if they chose, have done business with a competitive franchise system. The last Midas franchise was executed by a plaintiff in June 1959, almost

four years after Ross' first agreement in December 1955 (Statement, *supra*, pp. 6-7). And these weren't enough; Paragraph 22 of the complaint (D. App. 26) alleged that plaintiffs repeatedly requested, but were prevented from opening, even more Midas Shops and Skarupa specified "damages" of $20,000 per year for each of the three additional locations he didn't open (D. App. 85, 92), as well as "damages" for the stores he did open (App. 62).

Throughout their relationship with defendants and the other Midas dealers, each plaintiff joined in the Midas national advertising and voluntarily saturated their marketing area with their own local advertising to gain for themselves the benefits of the Midas image (App. 57-58, 65-66, 72-73, 79).[21] Plaintiffs' participation in the program was not limited to their own geographic areas; rather, plaintiffs joined other Midas franchisees in the dealers' National Advisory Council, gave speeches at the dealers'

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[21] These ads demonstrated to the court of appeals plaintiffs' "participation in and co-operation with the defendants in the programs of which they now complain" (CAO B 8-9) and also demonstrate the identification of the Midas trade and service marks and the Midas trade name with all parts of automotive exhaust systems, not just mufflers, and the unique desirability of the Midas guarantee good anywhere in the United States. Typical examples of plaintiffs' advertisements:

> "Look for the MIDAS Sign—America's only coast-to-coast network of exclusive auto muffler shops" (D. App. 86).
>
> "You get only nationally-advertised Midas products. . . ." (D. App. 89).
>
> "We're specialists in just *one* thing . . . your car's exhaust system . . . " (D. App. 86).
>
> ". . . and always depend on MIDAS muffler tailpipes & dual exhaust systems for complete safety" (D. App. 86, 87).
>
> "Your MIDAS muffler carries a written factory guarantee good from coast-to-coast!" (D. App. 86, 87).

conventions, wrote articles in the dealers' magazine, and even encouraged others to become Midas dealers (Statement, *supra*, p. 7).

At any time plaintiffs could have unilaterally cancelled the franchise agreements upon thirty days' notice without burden or financial loss, but plaintiffs were unwilling to utilize this available alternative as they reaped their enormous profits through the Midas program. Skarupa's annual salary of $44,000 for 1958 exceeded his total personal income for all of the six years prior to Midas; he enjoyed personal and corporate profits of $182,763.31 from a personal investment of $9,800 in his four years with Midas (App. 61). Ross more than doubled his 1955-56 fiscal year earnings in his first full year and took home over $154,000 in profits during his Midas years (App. 68-69). Pierce's coterie of corporations and enterprises made it difficult to ascertain his personal profits from Midas, but he has never denied the $180,000 attributed to him for his three and a half Midas years (App. 75-76). Wheeler's wages of $6,000 in 1955 became $29,000 as a Midas operator in 1957. Additional corporate income netted him close to $100,000 before he switched to a competitive franchise (App. 82).

Only when a Midas competitor promised them even more grandiose profits and more territory did plaintiffs decide to forego their Midas profits. Their decision was not made because of a "higher [Midas] price for non-trademarked exhaust system parts" (Pet. 5), but in order to attempt to capitalize on the benefits of the Midas concept as appropriated by a competitor.

Section 4 of the Clayton Act enlists ". . . the *sufferer* to aid in enforcement of the statute," *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 757 (1947). It does not

allow a persistent participant to reap the windfall of treble damages when his avarice is no longer being satisfied by his active pursuit of the allegedly condemned practices. The plaintiffs here are not an injured party; indeed, if the Midas program were illegal, it is the public which has been injured by the plaintiffs in cooperation with the defendants. Thus, the purpose of the antitrust laws is furthered by the doctrine of *in pari delicto,* as applied by the lower court, in barring these plaintiffs because of their cooperation and participation.

As stated by the court below:

> "Virtually every dealer, *particularly* plaintiffs, enjoyed substantial monetary gains from *participation* in the Midas program. . . . They voluntarily *acceded* to, *fostered* and *profited* from the very practice about which they now complain. . . . It would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine." (CAO B-5, B-9, B-13).

III. The Decision Below Does Not Conflict With The Decisions Of This Court Or Of Any Court Of Appeals.

As demonstrated above, this Court and the courts of appeals have uniformly and consistently recognized and approved *in pari delicto* as a defense in antitrust actions and no court has purported to abolish the doctrine.[22] Its applicability to any case depends upon the particular factual setting, as most clearly illustrated by the groups of cases in the same circuit, some applying and some rejecting the defense. In the Seventh Circuit itself, contrary to plaintiffs' contentions that that court considers the defense universally applicable (Pet. 25-27), the defense was rejected on the facts in *Jewel Tea Co.* v. *Local Unions,*

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[22] See cases cited in text and particularly in notes 12 and 14, *supra.*

etc., 274 F.2d 217, 223 (7th Cir. 1960), *cert. denied,* 362 U.S. 936 (1960), because plaintiff there was the "victim" not a participant in the alleged conspiracy. Later, on the facts in *Florists' Nationwide Telephone Delivery Network* v. *Florist Telegraph Delivery Ass'n.,* 371 F.2d 263, 267-268 (7th Cir.), *cert. denied,* 387 U.S. 909 (1967), and in this case, in both of which the plaintiffs participated fully in the alleged irregularities, the defense was accepted. Courts of appeals in other circuits have also accepted the defense in some cases and indicated that it did not apply in others where the facts differed.[23]

Analysis of facts to determine whether a court of appeals has correctly applied the *in pari delicto* doctrine is not one which warrants this Court's exercise of its certiorari jurisdiction. Accordingly, this Court has denied the writ in cases from the Seventh and Fourth circuits which applied the defense as well as in those in which the defense was rejected.[24] The same result should occur in the instant case, particularly when there is no conflict in any of the decisions and the facts here demonstrate that this is a most appropriate case for the application of the defense.

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[23] In the Second Circuit, compare *Eastman Kodak Co.* v. *Blackmore,* 277 Fed. 694 at 700-701 (2d Cir. 1921) with *Ring* v. *Spina,* 148 F.2d 647 at 653 (2d Cir. 1945); in the Fourth Circuit, *Pennsylvania Water & P. Co.* v. *Consolidated G. E. L. & R. Co.,* 209 F.2d 131, 133-34 (4th Cir. 1953), *cert. denied,* 347 U.S. 960 (1954) with *Osborn* v. *Sinclair Refining Co.,* 286 F.2d 832 (4th Cir. 1960), *cert. denied,* 366 U.S. 963 (1961), second opinion, 324 F.2d 566, 568-69 (1963).

[24] See cases cited in text above and preceding footnote.

IV. Dismissal Of Count One On The Alternative Ground That The Individual And Corporate Actions Of The Defendants Here Were Those Of A Single Integrated Business Entity Was Correct.

Throughout the trial court proceedings plaintiffs argued in accordance with Count One of the amended complaint that the corporate and individual defendants engaged in a *horizontal* combination or conspiracy to restrain trade.[25] However, the corporate and individual relationships herein established that only one business entity has ever been involved and as this Court has stated it is the "substance" of the relationships which is "determinative."[26] Each corporate defendant was wholly owned, controlled, managed and directed by Nathan and Gordon Sherman (D. App. 41). International Parts sold all the products and employed the five individual defendants (D. App. 42). Midas, Inc. had no employees and was merely a corporate shell to hold the Midas trademarks, trade names, service marks and franchise agreements for its parent,

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[25] The amended complaint alleged "the defendants and other co-conspirators *unknown* violated Section 1 of the Sherman Act . . . in that *they* combined together, . . . and/or contracted, . . . and/or conspired unlawfully to fix and maintain prices of automotive exhaust parts and to create and/or induce a commercial boycott . . . ." (D. App. 18-19).

[26] Defendants have never contended that common ownership and control alone immunizes them from the antitrust laws, *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951). Instead, as *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947), on which *Kiefer-Stewart* depends, points out: "The corporate interrelationships of the conspirators . . . are *not determinative* of the applicability of the Sherman Act. That statute is aimed at *substance* rather than form."

International Parts (D.App. 44).[27] Midas could not possibly compete or hold itself out to compete with International and plaintiffs were fully aware that purchasers of Midas and International brands were necessarily the customers of only International.[28]

Now, the plaintiffs make a belated attempt to avoid their own words in the complaint and change the charge from a *horizontal conspiracy* among defendants and others "unknown" to a *vertical "contract"* with plaintiffs themselves. This contention was not made in the trial court where plaintiffs chose not to contradict the affidavit which established the substance of the corporate defendants' relationship. Such a switch from a theory alleging that plaintiffs as non participants were damaged by a conspiracy among defendants and outsiders to the present theory that plaintiffs and defendants contracted to damage plaintiffs, only places the plaintiffs more firmly in the position of *in pari delicto.* The court below did not "ignore" the contentions as to these contracts (Pet. 29); it decided the contract issue squarely in defendants' favor on the basis of the *pari delicto* defense.

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[27] The other corporate defendants are a manufacturing subsidiary and a distributing subsidiary which had no contact with, relationship to, or effect upon the plaintiffs (D. App. 42).

[28] Were Midas and International in substance separate business entities and sellers, how could plaintiffs justify their Count Three charge (D. App. 19-20) of price discrimination under the Robinson-Patman Act (15 U.S.C. 13) which requires two purchases from a single seller?

V. Summary Judgment In An Antitrust Suit Is Appropriate Where No Disputed Material Facts Exist.

Litigants have been expressly advised by the Court that "Summary judgments have a place in the antitrust field, as elsewhere. . . ." *White Motor Co.* v. *United States*, 372 U.S. 253, 259 (1963). The caveat that summary judgment should be used sparingly in "complex antitrust litigation where motive and intent play leading roles . . . [and] the proof is largely in the hands of the alleged conspirators. . . ." *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962) has no bearing on the factual or legal issues in the *pari delicto* defense here. "Proof of subjective states is not involved"[29] and furthermore, the undisputed "proof" from the "completed" and "exhaustive discovery procedure" (Pet. 29, f.n. 49) which established that these plaintiffs were *in pari delicto* did not come from any "alleged conspirators" but came "largely," if not almost totally, from the mouths of plaintiffs themselves.[30]

The Court in *White Motor Co.* v. *United States*, 372 U.S. 253 (1963) cautioned those opposing summary judgment motions that the present Civil Rule 56 does not allow them

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[29] *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896, 900 (7th Cir. 1966).

[30] None of the cases cited (Pet. 29) other than *Poller* contain any mention of the appropriateness of summary judgment. In *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964) and *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), summary judgments were reversed on matters of substantive law, but the Court did not question the procedure. A motion to dismiss and a directed verdict were involved in *Radovich* v. *National Football League*, 352 U.S. 445 (1957) and *Continental Ore Company* v. *Union Carbide Corp.*, 370 U.S. 690 (1962).

to "rest upon mere allegations" but requires a response by affidavit or otherwise (372 U.S. at 254-55). Since plaintiffs never claimed "that any restriction was imposed by defendants other than those provided in the franchise agreements" (CAO B-5), the contractual arrangement to which they voluntarily agreed was the *sole basis* of plaintiffs' lawsuit and no factual issue could be raised. By their decision to file no counter-affidavit or counter-appendix or to avail themselves of the other remedies (or obligations) of Rule 56(f), plaintiffs accepted defendants' appendix and affidavit as the necessary and material facts to decide the summary judgment.[31]

There is nothing in the record to suggest that summary judgment was an incorrect procedure in this case.

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[31] The plaintiffs' deposition testimony excerpted in the Appendix attached hereto was "uncontroverted except by counsel's arguments" (DCO F-9) and also "plaintiffs have failed to counter the joint affidavit of Nathan and Gordon Sherman." (DCO F-12).

CONCLUSION

For the reasons set forth above the petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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Dated: November 1967

APPENDIX A

The pertinent provision of Title 28 United States Code is as follows:

28 U.S.C. §2101. Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

The pertinent provisions of Rule 56 of the Federal Rules of Civil Procedure concerning summary judgment are as follows:

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. *When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations* or denials of his pleading, but, *his response, by affidavits or as otherwise provided in this rule, must set forth specific facts* showing that there is a genuine issue for trial. *If he does not so respond, summary judgment, if appropriate, shall be entered against him.*

"(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the

motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

The pertinent provisions of Rule 21 and 22 of this Court are as follows:

Rule 21

REVIEW ON CERTIORARI—HOW SOUGHT—PARTIES

1. Review on writ of certiorari shall be sought by filing with the clerk, with proof of service as required by Rule 33, forty printed copies of a petition, which shall conform in all respects to Rule 23, and a transcript of the record in the case, including the proceedings in the court whose judgment or decree is sought to be reviewed, which shall be certified by the clerk of the appropriate court or courts below. The entire record in the court to which certiorari is addressed shall be filed unless the parties agree that specified parts may be omitted as unnecessary for the determination of the petition or of the writ, if it be granted.

. . .

Rule 22

REVIEW ON CERTIORARI—TIME FOR PETITIONING

3. A petition for writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within the time prescribed by law. . . .

APPENDIX B

The proceedings below involved extensive pretrial discovery by all parties including production of thousands of documents, deposition testimony, and exhibits covering hundreds of pages and extensive interrogatory answers (Pet. 29-30, f.n. 49). In support of their summary judgment motion, defendants submitted to the district court the following "Appendix" which was a chronological narrative abstract of this record material. Not one statement in this Appendix was ever disputed by plaintiffs (DCO F-9).

The Appendix is reproduced here in the form submitted to the court of appeals and the page numbers appearing thereon are the page numbers in the "Appellees' Appendix" filed therein. It is in the same form as submitted to the district court except that specific page references to the Record were affixed and interlineated after the notice of appeal had been filed.

1201 TABLE OF CONTENTS FOR APPENDIX

1203 IN THE

United States District Court

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

PERMA LIFE MUFFLERS, INC., et al., *Plaintiffs,* vs. **INTERNATIONAL PARTS CORPORATION, et al.,** *Defendants.*	**Civil Action No. 60 C 1636**

APPENDIX

This Appendix contains a separate chronological summarization with respect to each plaintiff. The record references throughout relate to a specific page, *e.g.,* (100), of the plaintiff's deposition testimony, except where such reference specifically identifies another record source, such as (Dep. G. Sherman p. 100) or (Plaintiff's Interrogatory Answer IV). After the initial depositions a further production of documents by plaintiffs was necessary, and when this was completed each plaintiff appeared for a supplemental deposition, which testimony is identified by the letter "S," as (S. 100). Documents produced by plaintiffs or defendants and marked at depositions are identified as (DX 100) or (PX 100). All deposition transcripts and exhibits have been filed with the Court.

1204 Throughout the Brief in Support of Defendants' Motion for Summary Judgment the factual statements therein are referenced to the exact page of this Appendix, as (App. 1).

I.

GREGORY T. SKARUPA

Gregory Skarupa is the alter ego of four plaintiff corporations[1] owned by him and his wife (4-8). These corporations, from March 1956 to February 1960, operated Midas Muffler Shops in the Washington, D.C., area.

Pre-Midas

Skarupa became a resident of Washington, D.C., in 1939 when he was employed as a clerk and messenger by a government agency (10-11). In 1955, while employed by the Veterans Administration, he visited his brother-in-law's muffler shop in Cincinnati, Ohio, and since it appeared profitable Skarupa decided to open a similar shop (14-15, 17). Skarupa had no prior business experience with automotive exhaust systems or allied automobile products, but his military service had given him a familiarity with automobile parts (13).

His brother-in-law was then purchasing and installing International Parts exhaust systems, and he arranged a telephone introduction between Skarupa and Gordon Sherman (15-16). About September 1955, an International Parts salesman contacted Skarupa and discussed Skarupa's desire to duplicate the Cincinnati operation in the Washington, D.C., area, whereupon the International Parts

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[1] Those corporations identified in paras. 16(A) through 16(D) of the Amended Complaint, as Perma Life Mufflers, Inc., Perma Life Mufflers of Arlington, Inc., Perma Life Mufflers of Prince Georges County, Inc., and Perma Life Muffler Shops of Alexandria, Va., Inc. (R. 15)

1205 salesman agreed to help Skarupa start in business (16, 18, 20). Without contacting any other manufacturer, Skarupa began to look for a shop, and within about five days he had decided upon a location in Wheaton, Maryland (20, 22-23). By October 15, 1955, he had contacted an attorney, formed Perma Life Mufflers, Inc. and had the official opening of his Perma Life Muffler Shop (8, 23-24). His investment in this instance was $5,200 (128, S. 27). His full-time employment with the Veterans Administration continued (12).

First Midas Franchise

From October 1955 to March 1956 Skarupa purchased and installed International exhaust systems (29), even though he understood that he could have handled any brand he desired (293). Although it was not until March 1956 that Skarupa first discussed with defendants the new Midas program which was then being introduced (16, 27, 29), he had previously discussed the proposed national chain of Midas shops with his brother-in-law (16-17). Gordon Sherman subsequently visited Skarupa's shop and discussed the Midas franchise requirements (29-30), the proposed national advertising (32), and the national guarantee which would be honored by each member of the chain (32-33). Skarupa's only concern was to obtain a franchise for the entire Washington metropolitan area in order that he "could reap the benefits of such development" (30, 35). Although he noticed other requirements in the franchise agreement, in his "heat of going into a new program" the only portion that concerned him was the geographical area of his franchise (35).

After this conference a franchise agreement was prepared and signed on April 10, 1956 (DX 13, 31-32). Skarupa examined this franchise "in detail," including the

1206 provisions on purchases, 2% advertising surcharge, prices and payment terms (46-47). He understood that the franchise related to the Midas trademark (47) and that an International Parts purchaser, which he then was, was not governed by the Midas franchise or merchandising methods (292). Although the Midas terms of payment were 10 days, Skarupa initially received an extended period of payment by use of 30, 60 and 90 day notes to help him get started (173-74).

Expansion in Midas

Skarupa's shop in Wheaton was profitable throughout 1956 (135) and within a short time after its change from a Perma Life Muffler Shop to a Midas Muffler Shop Skarupa was looking to expand to a second location. On December 1, 1956, he signed a second Midas franchise agreement covering a shop at Arlington, Virginia (DX 16). About $1,000 of Skarupa's personal funds were invested in this second shop (130).[2] His full-time employment at the Veterans Administration continued (12).

Almost immediately after this second Midas shop opened, Skarupa began thinking about a third shop, in Prince Georges County, Maryland (135), and on May 6, 1957, a franchise agreement was signed for a Midas Shop located in Cottage City, Maryland (DX 17). The capital investment in this instance was about $2,500 (136).

All three Midas Shops were then profitable (137), even though Skarupa was still a full-time employee of the Veterans Administration (12). His personal commitment to these business ventures amounted to a visit to a different shop every evening after his departure from his "regular employment," a visit and inspection of each shop on Satur-

[2] Skarupa's financial success by 1958 allowed him to purchase for $55,000 the building in which this Arlington shop was located (129).

1207 day, plus the necessary bookkeeping work which he did in the evenings (144-45). Skarupa's personal investment in his three Midas Shops was $8,800; although he was only a part-time Midas dealer, by 1957 he had received over $35,000 in wages as a corporate officer and in pre-tax corporate profits (DX 117-18).

In the fall of 1957 Skarupa began to look for further expansion into Alexandria, Virginia, and he was then advised that he would have to honor the Midas franchise provision that the owner devote full time to operation of the shop (137-38). In March 1958, Skarupa left the Veterans Administration, and with defendants' assistance he located a site in Alexandria and opened his fourth Midas Shop on July 30, 1958 (DX 18, 137-38). His capital investment in this shop was about $1,000 (139).

Advertising and National Participation in Midas

All of Skarupa's Midas Shops had the "Midas Muffler Shop" sign outside the buildings and Midas point of sale material within the buildings (132-33). Skarupa "advertised extensively in order to get the business started" (126) and his local advertising continued throughout his relationship with defendants. The printed advertisements and radio or television script that he used prominently emphasized "Midas," "Midas Muffler" and "Midas Muffler Shops," "Unconditional Factory Guarantee," "Specialists" and "15 Minute Service."[3]

The marketing area for Skarupa's four shops was confined to the cities and counties in which they were located[4]

[3] Skarupa's Answer to Interrogatory IV has 26 sample advertisements attached to it. (R. 461-65; R. 471-91)

[4] Skarupa's Answer to Interrogatory V. (R. 493)

1208 (187-88), and he was not in competition with any of the other plaintiff dealers (302-03). Even so, Skarupa's personal involvement with the Midas merchandising methods extended beyond the Washington, D.C., area. He became a member of the original National Advisory Council and served with that group until March 1958 (166). At one of the conventions of Midas dealers Skarupa gave a formal presentation (165). He was also a contributor to The Dealer Dabbler in which he took exception to a prior article by plaintiff Maxwell Ross (PX 36).

Desire to Expand

After the Midas Shop in Alexandria opened, Skarupa sought "to open up additional shops" (56) since he thought that three additional shops could be established in the Washington area (316). However, in late 1958, he was allegedly told that he could not expand further (162) and that other Midas dealers were to be established in the Washington area (57). At a meeting with Gordon Sherman in early 1959 Skarupa discussed his desire to expand his Midas operation further (59). According to Skarupa, he was offered one more Midas franchise but was informed that additional franchises in that area would go to other dealers (59).[5] Such an arrangement was unacceptable to Skarupa since it did not protect him from possible competition (59). After this conference Skarupa did not again discuss with defendants the question of his opening more Midas Shops (S. 42).

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[5] One of defendants' purported objections to Skarupa's further expansion was that he "was making too much money" and would need investment advice (60). DX 119 shows that for 1958 Skarupa's personal corporate salary for nine months' full-time effort was $44,000 and his corporate profit was an additional $23,109, for a total of $67,109.

1209 During this same late 1958 and early 1959 period Skarupa encountered other actions by defendants which he considered unacceptable. The credit allowed to the dealer upon return of a muffler had been reduced in January 1959, and the new Midas muffler, according to Skarupa, was no better than the original muffler and in some instances inferior (167-68). In April 1959, Skarupa began to install shock absorbers which he purchased from a former sales representative for International Parts (202).

Solicitation by Competitors and Abandonment of Midas

A Robin Hood representative for Maremont Corp., Bert Herskee, contacted Skarupa in the spring of 1959 (195).[6] He had known Herskee when Herskee was previously employed by International Parts (195). Herskee advised him that Maremont was going to start a chain of Robin Hood muffler shops and explained the purported advantages to a Midas dealer who would switch to that franchise, emphasizing the paramount atraction to Skarupa—an exclusive franchise for the entire Washington metropolitan area (196-97).

Periodically thereafter Skarupa was visited by Herskee and urged to sign a Robin Hood franchise agreement (197).[7] In late November 1959, Skarupa decided to abandon Midas and change over to Robin Hood (189-90, 194-95, 197). On December 11, 1959, Skarupa exercised his right to terminate

[6] Robin Hood is the brand name for exhaust systems sold by the Maremont Corp., a competitor of defendants (194-96).

[7] Solicitation of Skarupa by defendants' competitors was not limited to Maremont. In 1958 the president of the Texas Tail Pipe Co. telephoned Skarupa to solicit his business (273-74). Skarupa described such solicitation as a "regular stream of salesmen" (270).

1210 the Midas franchise agreements (DX 25). His reasons for termination were defendants' refusal to allow further expansion, the proposed competition from new Midas dealers in the Washington area, and the restriction on purchases (190-91). Eight days later Skarupa signed the Robin Hood franchise agreement (DX 105), and the first delivery of Robin Hood mufflers was phased to arrive the day after the Midas termination was effective (204). All of the Midas trademarked parts were returned to defendants (204).

Post-Midas Experience

When Skarupa left the Midas program on February 11, 1960 (70), his four Robin Hood shops began to sell many of the allied automobile products described in the Amended Complaint (216, 219, 241). Since Robin Hood gave no guarantee to the consumer, Skarupa began to issue his personal guarantee (200). Within this first fiscal year, 1960, each of his four former Midas Shops operated at a loss[8] for a total of approximately $13,700 (222, 243). His loss in the second year, 1961, was approximately $30,000 (243).[9]

In early 1962 he decided to get rid of the business (254), and by February 12, 1962, he sold all four shops for about $70,000 (10, 257). Two years as a Robin Hood dealer had necessitated that Skarupa return to his former employment at the Veterans Administration.

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[8] Skarupa characterized his problem as "related to a relatively unknown name to the public" [*i.e.*, Robin Hood] and admitted that for motorists the name Midas provided "more reliance and dependence" (318).

[9] The corporate federal tax returns for 1961 show a total loss of $31,076 (DX 64, 65, 66 and 67).

1211 **Midas Profits**

Skarupa's financial experience in the four Midas years, 1956 through 1959, was significantly different. His corporate profit and personal wages totaled $182,763.31[10] from a personal investment of $9,800[11] and only a part-time commitment of his own time for over half the period. When in 1958 he gave up his government position and became a full-time Midas dealer his corporate and wage income totaled $67,109, consisting of personal wages of $44,000 and corporate profit of $23,109 (DX 119). For 1959 his income was $80,607, consisting again of personal wages of $44,000 and a corporate profit of $36,607 (DX 120). Skarupa's personal wages for *each* of the years 1958 and 1959, $44,000, *exceeded* his total personal income for all of the six years prior to Midas.[12] These profits were actually increased by about $18,000 for 1958 and 1959 since the rent expense (DX 109 and DX 113) for Skarupa's Midas Shop in Arlington, Virginia, was in part a payment to Skarupa since he had purchased that building (129).

For these four years Skarupa voluntarily continued in the Midas program,[13] he received approximately $200,000

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[10] 1956 shown on DX 107 and DX 117; 1957 shown on DX 118; 1958 shown on DX 108 through DX 111 and DX 119; 1959 shown on DX 112 through DX 115 and DX 120.

[11] Skarupa's Answer to Interrogatory III.

[12] Skarupa's Answer to Interrogatory XV shows that his pre-Midas income for 1950 through 1955 was between $5,000 and $7,700 per year. (R. 881)

[13] Skarupa estimated that he serviced about 57,000 automobiles during his period with Midas (97).

1212 in profits. By this suit he seeks to recover an additional profit of $843,132.[14]

Conspiracy Allegations

No basis for the alleged conspiracy among the corporate divisions of International Parts and their officers and agents was testified to by Skarupa. He acknowledged that any documentary evidence relating thereto would have been within documents he produced (77-79), yet none of these documents support this assertion. The only conspiracy which he alleged was an understanding that he and all the Midas dealers were to follow the price lists (74-75).

II.

MAXWELL E. ROSS

Maxwell Ross and his relationship with defendants from late 1955 until late 1959 provided the factual setting for the allegations made by five plaintiffs,[15] through which Ross operated four Midas Shops located in Muskegon, Grand Rapids, Kalamazoo and Battle Creek, Michigan, and two in Minneapolis, Minnesota. Ross and his wife were the sole owners of these business enterprises and Ross was the chief executive (28-29).

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[14] Skarupa's Answer to Interrogatory II. He seeks an additional amount in damages because of the restriction on his further involvement in the Midas Program by not being able to open three more Midas Shops (310-11, 316-17). (R. 449-57)

[15] Those plaintiffs are identified in paras. 16(E) through 16(I) of the Amended Complaint as: Robin Hood of Grand Rapids, Inc.; Robin Hood of Muskegon, Inc.; Regina M. Ross, assignee of Maxwell F. Ross, t/a Robin Hood Muffler Shop; Regina M. Ross, assignee of Maxwell E. Ross, formerly t/a Midas Muffler Clinic of Minneapolis; Regina M. Ross, assignee of Maxwell E. Ross, formerly t/a Midas Muffler Shop of Battle Creek. (R. 15-16)

1213 **Pre-Midas**

Prior to 1951, Ross did accounting work and had business experience as the organizer of a concern which sold automobile car polish (4-7). Beginning in 1951 he was the sole proprietor of Heights Auto Parts Co., an auto parts and wrecking business located in Muskegon, Michigan (7-8), which concern sold new and used auto parts, including exhaust systems which it purchased from International Parts (10, 14, 21). In Ross' sales of exhaust systems at that time "brand names were not important" (24). In November 1955, Ross acquired a new location in Muskegon for his auto parts business (20).

First Midas Franchise

In late 1955, Ross discussed with an International Parts salesman the Midas merchandising method which Ross described as the "new concept" of selling an exhaust system under a "free installation" approach to the consumer (224). The Midas concept—the guarantee, the national advertising, and the quick service of 15-minute installation—"excited" him (239-40). He recognized this as a good idea, "a magical term," and thought "it was a way of making some real money" (239).

Ross was then purchasing International brand exhaust system parts, and he was cognizant of the different methods whereby International Parts merchandised its International brand and its Midas brand, including the different terms of sale and an additional 2% surcharge for national advertising of the Midas brand (229-30).

After his exposure to this "new concept" (224), Ross investigated it further and inspected a Midas Shop in Milwaukee, Wisconsin, to find out "the things a person would normally want to know" before going into such a business

1214 (226). Ross thinks that he may have consulted an attorney at this time (361-62). Within a month, December 7, 1955, Ross read and signed his first Midas franchise agreement (237, DX 9 and DX 10), and on December 15 he started installation of the Midas exhaust systems (36).

Expansion in Midas

Thereafter Ross sought to expand his Midas operation and to open additional shops in other cities in Michigan and Minnesota. His first expansion occurred within six months when he opened a Midas Shop in Grand Rapids, Michigan, and executed his second Midas franchise agreement in May 1956 (39-40, 120). Several months later, and still within a year of his first knowledge of Midas, Ross extended his operation to Minnesota with the opening in October 1956 of a Midas Shop in Minneapolis (42-43). At that time, Ross sought an exclusive franchise for all future Midas Shops in Minneapolis and St. Paul (44), even though he had never before engaged in business in that area (127). In May 1957, Ross expanded his Minneapolis operation with the opening of his fourth Midas Shop and his second in that city (47).

By April 1958, Ross had sold one of his Minneapolis shops (127-29), and his other Minneapolis shop was closed in August 1958 (185). Contemporaneous with closing his Minnesota operation, Ross in April 1958 purchased a Midas Shop in Kalamazoo, Michigan (168-69). He operated this Kalamazoo shop for about a year when he decided to seek a better location, and after consultation with the Midas architects (170-71) he constructed a new building in Kalamazoo "in keeping with the Midas concept" (62). Approximately three months after the new shop had been operating he recognized that there was need for only one shop in Kalamazoo and closed the original shop (172-73).

1215 In May 1959, Ross again expanded his operation when he opened his fourth Midas Shop, in Battle Creek, Michigan (55).

Geographically, the market area for Ross' four Midas Shops encompassed the Michigan counties of Muskegon, Kent, Kalamazoo and Calhoun (278-79).[16] He described his sales impact in these areas as "tremendous" because of this "effective" and "novel" concept (281). His volume of business during 1959 increased to the point that he purchased a tractor and trailer to transport Midas merchandise from Chicago to his four shops throughout the Michigan area (231-32).

Advertising and National Participation in Midas

Ross recognized that advertising of the Midas exhaust system made a significant contribution to his market "impact," that Midas originated direct consumer advertising of mufflers, that by such advertising "the Midas story had become known" and created a public "demand," and that such advertising had given Ross the valuable image of "more substance" and "more credibility" (212, 313, 322, 427). Ross' shops displayed "the Midas sign identification" (268).

To supplement the Midas national advertising which reached his area (390-391), Ross employed local advertising[17] using material furnished by defendants (306),

[16] Interrogatory Answer V states "city or county in which each" shop was located. (R. 911)

[17] A detailed statement of Ross' advertising of the Midas trade name and service mark is contained in his answer to Interrogatory IV. (R. 907-10)

1216 and it was successful (302) to the extent that he "was known as Mr. Midas" (S. 202).

Ross' involvement with Midas and its merchandising methods during the four-year period of his franchise agreements was not limited to his own shops. In early 1957, Ross became one of the original ten members of the dealers' National Advisory Council (284). According to Ross, the purpose of this Council was the formulation by dealers of "ideas and patterns of operation to produce the optimum profit for each Midas operator" (288). He characterized himself and the other dealers as initially being "guinea pigs" (303). His own contribution to the Council and to all Midas dealers was the help he gave to create the Midas field counselor (287), whose function was to visit the shops and help improve them (290). As late as May 1959, Ross had a letter published in The Dealer Dabbler wherein he circulated suggestions to all Midas dealers (PX 30).

Desire to Expand

Significant success came to Ross' new shop in Kalamazoo whereupon he decided to expand by opening a second Midas Shop in Grand Rapids (172-73). Ross, in early 1959, "liked the program," so much that he offered to construct two new buildings in Grand Rapids and then to vacate the older premises where he was then operating a "very prosperous shop" (172-74).

During this same period Ross became displeased with certain actions of defendants. He encountered hesitancy from defendants in concurring with his desire to add another outlet in Grand Rapids (172). Just prior to this time Ross had disagreed with defendants over the return

1217 of merchandise involved in his purchase of the Midas Shop in Kalamazoo (170). He was unhappy with the change in the muffler replacement credit to the dealer which had become effective in early 1959 and which in Ross' judgment had become prohibitively expensive (179).

Solicitation by Competitors and Abandonment of Midas

In early 1959, Ross spoke with an unnamed Robin Hood[18] representative concerning the possibility that Ross terminate his relationship with Midas and that he affiliate with the Robin Hood franchise system of selling exhaust systems (161-62).[19] Subsequently Ross was visited by Bert Herskee, a former Midas field counselor who was then the sales manager for Robin Hood, and Ross was again solicited to abandon Midas and convert to Robin Hood (162-63). Among the enticements offered to Ross was the exclusive Robin Hood franchise for the entire State of Michigan, a second line muffler, and the availability of merchandise at a cheaper price (163).

When Herskee again solicited Ross in October 1959, Ross agreed to terminate his Midas franchises and to change over to the Robin Hood program (166-67). On November 13, 1959, he exercised his contract right and sent a letter to defendants terminating his Midas franchises (146-47, DX 6 and DX 7). He tried to sever all connections, including the return of merchandise, within thirty days (315).

[18] Robin Hood is the brand name for exhaust systems sold by the Maremont Corp., a competitor of defendants (151).

[19] Ross characterized the Midas Shops as being known in the trade as "a successful organization individually and collectively." He was contacted and solicited all through this time by defendants' competitors (396-97).

1218 **Post-Midas Experience**

On December 13, 1959 (150), Ross began to sell exhaust systems as a Robin Hood dealer. He continued to operate his four shops in substantially the same manner, the only change being the introduction of shocks and springs (152). Although Ross obtained a franchise agreement from Maremont as the exclusive Robin Hood dealer for the State of Michigan, he did not open any additional shops (152). Under the Robin Hood program, no written guarantee to the consumer was issued by the manufacturer (S. 172), and so Ross issued his personal guarantee to the customer which he described as approximately the same as the Midas guarantee (164).

Without dispute, as a Robin Hood dealer Ross was financially unsuccessful (315). Robin Hood had no national significance and had never "spent the kind of money on national advertising that Midas did" (319-20). Ross spent a good deal of money advertising the Robin Hood program (337). Two former Midas Shops closed in the first year, Battle Creek in August 1960 and Kalamazoo in December 1960(185-86). For his first fiscal year as a Robin Hood dealer, July 1960,[20] Ross had a corporate loss of $20,165 (DX 184). Grand Rapids closed in October 1961 and Muskegon in December 1961 (325). In two years his former Midas Shops were out of business.

Midas Profits

Significant and undisputed financial success came to Ross during his four years as a Midas dealer.[21] In the fiscal

[20] Ross had a fiscal year for all his business ventures of August 1 through July 31.

[21] Ross' income tax records for the period prior to 1955 are not available (Ross' Interrogatory Answer XV). (R. 9+2)

1219 year ending July 31, 1956, during which time he operated his wrecking business and opened his first two Midas Shops, he had a net profit of $21,139 (DX 179). During the fiscal year ending July 1957 his profit had risen to $75,961 on his Michigan shops, with an over-all profit of $52,716, limited by the losses on the distant operations in Minnesota (DX 180). During the next fiscal year Ross incorporated his various shops and in July 1958 had a total profit of $41,198, consisting of a pretax corporate profit of $20,398 plus a personal income as a corporate officer of $20,800 (DX 181). For the 1959 fiscal year Ross had a total profit of $39,313, including a pretax corporate profit of $18,513 and a personal income of $20,800 (DX 183).

In four fiscal years, Ross made approximately $154,000 as a Midas dealer. By this lawsuit he seeks an additional $488,400[22] in alleged unobtained profits for this same period.

Conspiracy Allegations

Ross' knowledge of the alleged conspiracy among defendants was based solely on the relationship between International Parts and Midas (98).[23] He admitted that he knew of no events relating to the alleged conspiracy (394-95) and that he had turned over to his counsel all documents relating thereto (97).

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[22] Paras. 41(E) through 41(1) of the Amended Complaint. (R. 15

[23] Ross admitted that he did no business with the defendant Powell Corp. and that none of his competitors were customers of Powell (409). He never mentioned defendant Muffler Corp.

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III.

JOSEPH PIERCE

Pierce Muffler Shops, Inc. was the corporate structure through which Joseph Pierce, from April 1956 to September 1959, operated seven Midas Muffler Shops in the upstate New York cities of Binghamton, Syracuse, Utica, Rome, Elmira and Mattydale.[24]

Pre-Midas

Pierce was a lifetime resident of the Syracuse, New York, area and has been in business there for many years (2-5). Western Auto had a dealership program, and in 1937 Pierce opened one such store in Fulton, New York (4-5). He continued in this business until 1946, during which period he opened additional Western Auto stores in Oswego and Baldwinsville (5). J. C. Pierce, Inc., not the present corporate plaintiff, was formed in 1947, and thereafter Pierce added retail stores in Syracuse, Rome, Canastota, Cortland and North Syracuse (6-10). These stores handled many automotive and non-automotive products, including International brand exhaust systems, but Firestone tires were their major item (11-14). Pierce sold his retail stores in Canastota, Cortland and North Syracuse in 1951 and the store in Syracuse in 1952 (27-28). A fire destroyed the Baldwinsville store in 1960, so Pierce, through his separate non-party corporation, now operates retail stores only at Fulton and Rome (28).[25]

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[24] It is identified in para. 16(M) as Pierce Muffler Shops, Inc., formerly Midas Muffler Sales & Service, Inc. (R. 16).

[25] Throughout the subsequent period of Pierce's operation of Midas Muffler Shops, he sold International brand exhaust parts from these retail stores (47).

1221 In 1954, J. C. Pierce, Inc. diversified and established a new division, Muffler Sales and Service (19). Pierce had prior experience installing mufflers and shocks at his retail stores and he then felt that "there was a future to the muffler installation business."[26] Exhaust systems which Pierce was then selling were purchased from International Parts, and he discussed with an International Parts representative "opening a specialized muffler installation shop, muffler, springs and shocks" (22). Assisted by the International Parts representative, Pierce found a suitable location in Binghamton for his first muffler shop (22).

Pierce expanded his muffler installation business in September 1955 by opening a second shop in Syracuse (29, 31) and a third shop in Utica; these three shops were then consolidated into a separate corporation, Muffler Sales and Service, Inc. (30-32). In April 1956 the corporate name was changed to Midas Muffler Sales and Service, Inc. (36-37) and subsequently changed to Pierce Muffler Shops, Inc. (19), the present plaintiff. This corporation is owned by the Pierce family (50).

First Midas Franchise

Midas was first discussed by Pierce and an International Parts representative in February or March 1956, at which time Pierce visited a Midas Muffler Shop in Buffalo (38, 46) and discussed the Midas program with the shop owner (43-44). Pierce was informed that Midas Shops were to be opened in upstate New York and that existing purchasers from International Parts were to be given the first opportunity to obtain the new franchises (39). "So as not to

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[26] Pierce's personal income for 1953 through 1955 was, respectively, $20,028, $17,977 and $9,929 (Pierce's Interrogatory Answer XV). (R. 767)

1222 invite competition,'' Pierce signed his first Midas franchise agreements on April 1, 1956, for the three existing Pierce Muffler Shops in Binghamton, Syracuse and Utica (39, 54-56, DX 46, 47 and 52).[27]

Expansion in Midas

By June 1956, Pierce had opened his fourth Midas Shop, a second shop in Syracuse (36). His expansion continued, and by May 1957 he had obtained locations in Rome and Elmira and signed Midas franchise agreements for these two shops (36, DX 49 and DX 50). Sales by these shops had increased to such an extent by 1957 that Pierce opened a warehouse for his Midas operations in Syracuse (24-25). Without even asking defendants for another Midas franchise agreement, Pierce renewed his expansion in 1958 and opened his seventh Midas Shop, in Mattydale, a suburb of Syracuse (34, 36, 81).[28]

Advertising and National Participation in Midas

Pierce's shops were identified by the ''Midas Muffler Shop'' signs (111). There were Midas display cards and advertising material at all locations (113-14). Like the other plaintiffs, Pierce used Midas advertising material in his local advertising. A typical TV script advised the

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[27] Pierce acknowledged that he read the franchise agreements before signing them (134).

[28] On one occasion Pierce had a prospective Midas dealer at one of his shops and explained the Midas program to him and "told him I was enthused about it" (132). Later, Pierce brought a personal friend to defendants' headquarters in Chicago to inquire about a Midas franchise (91-92).

1223 motorist to "depend on Midas for the world's finest mufflers, tailpipes and exhaust systems."[29]

His involvement with the Midas concept was, like Ross and Skarupa, nationwide in that Pierce was also a member of the National Advisory Council (96).[30]

Pierce's Threats of Termination

Pierce was unhappy with the reduction from 100% to 50% on the credit to the dealer on the guarantee, which became effective on January 1, 1959. After two months' experience under the revised credit program he wrote Gordon Sherman and formally complained about the additional expense (DX 53). After reciting his displeasure with the quality of the Midas muffler, Pierce alerted Sherman as to his future plans by threatening: "I am writing you in all fairness and stating my dissatisfaction with the present program. If I should decide to make a change in the future I would like this to go on record as to the reason why" (DX 53). Subsequently, he voiced the same opinion to Midas field counselors who called on him (184), and in one such conversation Pierce indicated that he was thinking of taking on a different brand of mufflers (S. 123).

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[29] Pierce's local advertising expenditures and samples of other TV and radio scripts and newspaper mats are attached to Interrogatory Answer IV. All emphasized the Midas guarantee, the coast-to-coast service from exhaust specialists, and the Midas image of "clean, quick and courteous service." (R. 628-92)

[30] The market for Pierce's Midas Shops was limited to the cities and counties in which they were located (Pierce's Interrogatory Answer V), and he was not in competition with other Midas dealers (334). (R. 643)

1224 At various times throughout this period Pierce's Midas Shops sold and installed certain "allied automobile products" (121-23, 126-29). Although his practice of installing non-exhaust system parts was discouraged by the Midas field counselors, Pierce acknowledged that he was never threatened with termination of his franchises (319). During a personal conversation with Gordon Sherman, Pierce was told: "Joe, I will never tell you not to sell shocks and springs" (163). Pierce crystallized the field counselor's comments on his sale of non-exhaust system parts: "if I wouldn't [discontinue], there was not much he could do about it; all he could do was make his report" (160).

Using his Midas Muffler Shops, as an outlet, Pierce began, in 1958 or 1959, to sell Nu-Era Mufflers from all his locations (152-53, 305, S. 134-35). Pierce acknowledged that he issued a guarantee on these mufflers that did not differ from the Midas guarantee and that he did not know whether the customer knew whether he received Pierce's guarantee or the Midas guarantee (153-54).

Termination of Pierce

About March 1959, Pierce was contacted by defendants' Chicago office after he placed a large order, and he was advised that the balance in his account was too high and that the shipment would be C.O.D. unless Pierce cleared up his account (240). In about June 1959, Pierce requested that his franchise on the Midas Shop in Elmira be terminated in order that he could operate independently and sell allied automobile products (198-99).

Midas executives, since the letter of February 25, 1959, had been concerned about Pierce's threat of cancellation and had also been aware of the large balance existing in Pierce's account (Dep. G. Sherman pp. 310-13). When the balance on Pierce's account had been reduced, defend-

1225 ants exercised their right of termination by notice given on October 27, 1959 (Dep. G. Sherman p. 311, DX 55). Subsequently, Midas merchandise was returned to defendants by Pierce (225-26).

Post-Midas Experience

Following the termination of the Midas franchise agreements, Pierce was contacted by Herskee and offered the Robin Hood franchise program (352-53). Pierce was not interested in any franchise but agreed to purchase Arrow brand mufflers[31] from Herskee on the understanding that no Robin Hood competition would enter Pierce's market area (353-54). Pierce changed his operation by advertising shocks, springs, and second-line mufflers (243), and by subsequently closing three of his former Midas shops. He closed his Rome shop in 1960; sold his North Syracuse shop in 1961, and closed his Binghamton shop in 1962 (246).

Midas Profits

A fiscal year ending on September 30 was employed by the Pierce corporation.[32] Six months operation as a Midas dealer was included in the fiscal year ending September 1956, for which year Pierce had a gross profit of $31,311, consisting of pretax corporate profits of $17,269 and Pierce's personal wages from these operations, which does not include his wages from the J. C. Pierce, Inc., of $14,042 (DX 164). For the next fiscal year, ending September

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[31] Pierce did not believe there was any difference between the Robin Hood brand and Arrow brand mufflers (355).

[32] No separate financial statements on the individual Pierce shops are available (S. 113).

1226 1957, the comparable profit and wages were $16,454 and $12,000 for a total income of $28,454 (DX 165). By September 1958, the pretax corporate profit had risen to $26,778, and Pierce's personal wages had increased to $33,985 (DX 166). To this 1958 profit an additional $15,000 must be added as "a transfer of profit" to another of Pierce's corporations for a fiscal year total income of $75,763.[33] Fiscal year ending September 1959, Pierce's last complete fiscal year as a Midas dealer, brought a total profit of $45,619, consisting of a pretax corporate profit of $27,919 and personal wage of $17,700 (DX 170).

Profits of approximately $180,000 resulted from Pierce's relationship with the Midas program, and by this action he seeks to recover an additional $502,700, as requested in paragraph 41(M) of the Amended Complaint, or an additional $1,305,826, as computed by his answer to Interrogatory II. (R. 158; R 617-26)

Conspiracy Allegations

Pierce's knowledge of the alleged conspiracy was limited to the agreements between Midas, Inc. and the numerous Midas Muffler Shops and International Parts and the International dealers (284). All of the documents which he had relating to this claim were supplied to his attorneys (73-74).

IV.

CLAUDE D. WHEELER

Claude Wheeler, during the three-year period from September 1956 to November 1959 operated Midas Shops as a sole proprietor.[34] Two shops were located in St. Louis, Missouri and a third shop in East St. Louis, Illinois.

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[33] Pierce Interrogatory Answer III. (R 585)

[34] He is identified in para. 16(J) as Claude Wheeler, t/a Robin Hood Muffler Shops, formerly Midas Muffler Shops, an individual. (R. 16)

1227 **Pre-Midas**

From 1943 to 1956, Wheeler resided in Gideon, Missouri, which is about 200 miles from St. Louis. At that time he was the proprietor of a pool room (3-6). His income from this venture during 1950 through 1955 averaged approximately \$5,900 per year.[35]

First Midas Franchise

A Midas advertisement caught his attention in the summer of 1956, and Wheeler wrote defendants concerning the possibility of obtaining a Midas franchise (7-8). In August 1956 a representative of defendants visited Wheeler in Gideon, and Wheeler indicated an interest in a Midas Muffler Shop in St. Louis or Springfield, Missouri (8-10). The Midas merchandising methods were explained to Wheeler, including information as to the guarantee, an initial cost of \$5,000, physical and rent requirements for a shop, the national advertising program and the Midas dealer's 2% advertising surcharge (8-12). Wheeler was certain that the franchise agreement was discussed at this time (11, 16-17). At the conclusion of this meeting Wheeler was given some material explaining the Midas concept and was invited to visit defendants' offices in Chicago (8, 11).

About a week later Wheeler came to Chicago (12-14). He had no prior experience with exhaust systems and "wasn't too familiar with any type of a muffler" (7, 14), so he visited a Midas Shop in Hammond, Indiana, to observe, for the first time, the actual operation of a muffler installation shop (14-15). By the time Wheeler concluded

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[35] Wheeler's Answer to Interrogatory XV attached Wheeler's federal tax returns for 1950 through 1953 and they state such income, respectively, as \$3,330, \$5,636, \$5,615 and \$6,250. DX 148 and DX 149, tax returns for 1954 and 1955 show, respectively, income of \$8,189 and \$6,684. (R. 534-75)

1228 his Chicago trip he had decided to go into the Midas program; and an appointment was made to have defendants assist in looking for a location in St. Louis (17-19).

A location was promptly selected (20), and Wheeler's first Midas franchise agreement, which he read before signing, was dated September 6, 1956 (28-29, DX 39). Shortly after he executed the franchise agreement, Wheeler made a second visit to the Midas Shop in Hammond, Indiana, and spent several days closely observing the operation "to learn to run a muffler shop" (30). In less than two months since his first exposure to Midas or to a muffler, his Midas Muffler Shop in St. Louis opened for business on September 29, 1956 (29).

Expansion in Midas

Although this first shop incurred a loss for 1956, having been open for only three months, Wheeler in early 1957 was "getting to learn the business" and "wanted to expand" since he did not want another Midas dealer to come into the market (67-68). Assisted by a Midas field counselor, a second location was decided upon, and by March 1957 Wheeler opened a second Midas Shop in St. Louis (68, 77).

With the second shop open and the first shop showing "substantial volume," Wheeler saw prospect of a third shop to be located in East St. Louis (85). A location search was undertaken by Wheeler and a Midas field counselor, and by July 1957 a suitable building was found (86). The franchise agreement for this Midas Shop was signed on July 12, 1957 (DX 41 and DX 42), and the third shop was opened in September (107), still less than a year since Wheeler opened his first shop.

One of Wheeler's St. Louis shops did not progress as he anticipated, and in late 1958 or early 1959 he decided that it should be moved to a different location (119-20).

1229 The Midas field counselor suggested that a new shop be built (120), but Wheeler found an existing building in a location agreeable to defendants (124). During this period Wheeler was advised that another Midas dealer was going to be brought into the St. Louis area (134). Even though Wheeler objected to the prospect of potential competition, he proceeded to open the new shop in June 1959 (128, 134).[36]

Advertising and National Participation in Midas

Wheeler's shops were identified by the "Midas Muffler Shop" sign, and he also had Midas literature displayed inside (38, 94-95). Midas' national advertising through magazines, radio, and television entered Wheeler's area (222). He supplemented this with local advertising, which emphasized "Midas" and the nationwide chain of shops.[37]

Although his own market area was limited to St. Louis County and East St. Louis,[38] Wheeler became nationally involved in the Midas program, and near the end of 1957 he became a member of the National Advisory Council and served for a year (108). At a meeting of dealers, he spoke on the question of advertising (82).

Solicitation by Competitors and Abandonment of Midas

During the summer of 1958, a Maremont representative first explained the Robin Hood program to Wheeler, at which time Wheeler's reaction was that he "didn't care to go into it right at that time," but that he "would keep in

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[36] Wheeler said that he refused to sign a Midas franchise agreement for this new location because it gave him *too small a territory* and restricted purchases of related products (128).

[37] Wheeler's Answer to Interrogatory IV attaches example of the Midas scripts and mats which he used. (R. 803-24)

[38] Wheeler's Answer to Interrogatory V. (R. 825)

1230 contact" (155). In late 1958 or early 1959 Wheeler was again contacted by the original Robin Hood solicitor, who was then accompanied by Herskee (156). At a third solicitation, before Wheeler opened his third Midas Shop, he discussed with Herskee the critical issue, namely, that he "wanted to see what Midas was going to do with this new franchise" and whether Midas was going to bring in a new dealer (157). The proposed franchise from Robin Hood was for an exclusive right to the entire St. Louis and East St. Louis area (213-14). Another Robin Hood solicitation occurred after Wheeler's new Midas Shop opened, at which time Wheeler accepted an invitation to visit the Maremont factory in Chicago since he was thinking of changing from Midas (158). Shortly thereafter, on September 4, 1959, Wheeler advised Midas that his franchise agreements were terminated effective November 9, 1959 (DX 45). On September 24, Wheeler's new Robin Hood franchise was executed (DX 147).

Wheeler's Ultimatum Re His Midas Expansion

Upon defendants' receipt of the termination notice, Wheeler was immediately contacted by Midas' field counselors, but they were unsuccessful in attempting to persuade him to stay in the Midas program (140-41). A few days later Gordon Sherman came to St. Louis to confer, at which time Wheeler said that he was leaving the program because Midas was "bringing someone else into my territory" (178-79).[39] Wheeler told Sherman he would "stay in the program" if he received a 100% guarantee on returns (179). He also insisted that he be given "an

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[39] Wheeler asserted that he first inquired as to an exclusive Midas franchise for St. Louis on his first trip to Chicago and was then advised that expansion depended "on how the shop operation went" (16).

1231 exclusive franchise," and would even be willing to purchase the objectionable prospective Midas Shop in St. Louis from its owners (179).[40] Gordon Sherman would not agree to this ultimatum (179), and there was no further discussion between the parties (181). Wheeler sent "all of the Midas merchandise back to the factory for credit" (181).

Post-Midas Experience

As a Robin Hood dealer, Wheeler added selected "allied automobile products" in all three shops (184-85, 210-11) and purchased exhaust system parts from several manufacturers (153-54). Similar to Ross and Skarupa, he issued a personal guarantee on the Robin Hood muffler (171-72). Although Wheeler's Robin Hood franchise encompassed the large geographic area he sought from defendants,[41] he closed one of his St. Louis shops in January 1961 (137-38), and he did not open any additional shops (214).

Like the other plaintiffs, Wheeler's post—Midas experience was remarkably unsuccessful when compared to his financial success with Midas. In 1960, Wheeler incorporated his two Robin Hood shops in St. Louis, and by the end of that year these corporations had a net operating loss of $13,320 (DX 143), with the East St. Louis shop having a

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[40] Wheeler acknowledged that other Midas dealers did not then compete with him (S 238).

[41] As described in Wheeler's Robin Hood franchise agreement, the area included somewhat more than the eastern one-third of Missouri, with St. Louis on the east and Columbia and Jefferson City on the west, and the southwest portion of Illinois, from Alton to Cairo, including all of the area around East St. Louis, and with the addition of Quincy, on the Illinois-Missouri border (DX 147).

1232 net profit of $6,051 (DX 145). In 1961, Wheeler again operated at a loss, the St. Louis corporate operations losing $8,016 (DX 144), and the profit from the East St. Louis proprietorship being reduced to $2,789 (DX 146). By the end of 1961, Wheeler had closed one of his shops (137), and he was in the same financial position as he had been in the early 1950s when he operated the pool hall.

Midas Profits

Wheeler had operated under the Midas franchise and the Midas merchandise methods during part of 1956, all of 1957 and 1958, and substantially all of 1959. His personal investment in these three Midas Shops was estimated at $30,000 (121, 263). In 1957, Wheeler's participation in the Midas program brought him a personal income of $29,920 (DX 133, 134, 135 and 151), even though two of his shops had been opened during that year. For 1958 his income had risen to $34,562 (DX 136, 137, 138 and 152), even though the East St. Louis shop had been closed by a labor strike for a month during that year (97). For 1959 there are no financial statements that reflect the Midas portion of the year, that is, through November 9 (S. 95); however, the entire year, including the expenses attributed to the change-over from Midas to Robin Hood, brought a profit of $34,034 (DX 139, 140, 141, 142 and 153).

To the almost $100,000 in personal profits during his three years with Midas, Wheeler now seeks to add $439,544.06.[42]

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[42] The damages claimed in Wheeler's Answer to Interrogatory II. (R. 792-801)

1233 **Conspiracy Allegations**

As with all of the plaintiffs, Wheeler produced every document he had relating to the alleged conspiracy (55). None of these documents support his claim.

In the Supreme Court of the United States

OCTOBER TERM, 1967

PERMA LIFE MUFFLERS, INC.; et. al.,
Petitioners,

vs.

INTERNATIONAL PARTS CORPORATION; et. al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' MEMORANDUM OF ADDITIONAL AUTHORITY

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Dated: December, 1967

McCORMICK & HENDERSON, INC., CHICAGO

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RESPONDENTS' MEMORANDUM OF ADDITIONAL AUTHORITY

The Brief in Opposition was filed on November 27, 1967; on November 29, 1967, the Court of Appeals for the Seventh Circuit issued its opinion in *Crawford* v. *Colby Broadcasting Corporation*, No. 16,135, 7th Cir., November 29, 1967, a case involving the defense of *in pari delicto,* which is attached hereto as Appendix C. This memorandum is being filed pursuant to paragraph 5 of Rule 24 of this Court's Rules.

This recent rejection of the *in pari delicto* defense on the facts there involved conclusively disposes of the petitioners' contentions that the Seventh Circuit has indiscriminately applied the defense solely on the basis of entry into an allegedly illegal contract by the plaintiffs (Pet. 8-9), and that consequently any and all allegedly illegal franchises are automatically subject to this defense (Pet. 17-25). The court in that opinion (App. C, App. 4-5, *infra*) explains that its decision in the instant case was based on the undisputed facts as to plaintiffs' participation in, and their furtherance of, the Midas program, not simply on the execution of the contract:

> " . . . the availability of the *in pari delicto* defense requires something more than that the party against whom it is asserted merely accepted a contract containing an illegal restraint instead of refusing to deal. *Simpson* v. *Union Oil Co.*, 377 U.S. 13.
>
> "[In *Perma Life Mufflers, Inc.* v. *International Parts Corporation*] . . . the plaintiffs were shown to have engaged in conduct having the effect of encouraging and perpetuating the 'wrong' with respect to which they later complained. They sought and acquired additional franchises containing the restrictions alleged to have been illegal. They cooperated with the defendants in the very conduct for which they later sought recovery. Desirous of bettering their own economic positions the plaintiffs embraced the proposition offered by the defendants. Thus, neither *Crest* nor *Perma Life* is dispositive here.
>
> "We believe it clear that the mere fact that a plaintiff has entered into an agreement which imposes an unlawful restraint upon him does not sustain the *in pari delicto* defense as a matter of law. The question to be resolved in determining the applicability of that defense is whether the plaintiff was an active and willing participant in the unlawful restraint. . . ."

The case further makes even clearer that the decisions by the Courts of Appeals concerning *in pari delicto* are purely questions of the application of an established principle to differing fact situations and do not involve important questions of federal law worthy of review by this Court.

Respectfully submitted,

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Dated: December 1967

APPENDIX C.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967—SEPTEMBER SESSION, 1967

No. 16135 RUTH CRAWFORD, Executrix of the Estate of PERCY B. CRAWFORD, Dec., *Plaintiff-Appellant,* v. COLBY BROADCASTING CORPORATION and JULIAN COLBY, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 29, 1967

Before HASTINGS, *Chief Judge,* and KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* Ruth M. Crawford, plaintiff-appellant, brought this suit in the District Court under 15 U.S.C.A. §15[1] seeking to recover treble damages, costs,

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[1] Plaintiff also asserts the existence of diversity and pendent jurisdiction, and liability under the provisions of Indiana anti-trust statutes. 5 Burns Ind. Stats. Ann. Sections 23-116, 23-117 and 23-122.

and a reasonable attorney's fee, and for injunctive relief against the defendants. The court granted defendants' motion to dismiss plaintiff's amended complaint, and dismissed the action. Plaintiff appealed.

Insofar as pertinent to the issues presented on appeal, the allegations of plaintiff's amended complaint are, in substance, that prior to May 6, 1959, South Shore Broadcasting Company (to which defendant Colby Broadcasting Corporation is the successor by merger) owned and operated radio stations WJOB (an AM station) and WJOB-FM which engaged in broadcasting and in the solicitation of advertising in interstate commerce; that under date of May 6, 1959, South Shore and plaintiff's decedent, Percy B. Crawford, entered into a lease-purchase agreement[2] under which the corporation's license to operate radio station WJOB-FM was assigned to Crawford; that pursuant to the agreement the station's call letters were to be changed, and they were subsequently changed to WYCA; that "for the purpose of restraining interstate commerce in radio broadcasting in Indiana and Illinois and of obtaining a monopoly of radio broadcasting in Hammond, Indiana, South Shore refused to assign its

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[2] The agreement provided for the transfer of title to the transmitter, monitors and console used for the FM broadcasting to the lessor-purchaser at the end of the 10 year lease period; until July 1, 1963, the use of WJOB's antenna and tower, use of certain space for studio and office purposes, the furnishing of the electrical power and engineering personnel necessary to the FM operation; and that "for a period of ten years following consummation, neither Buyer nor any company or group in which he is a principal shall compete for advertisers, except churches, with Station WJOB in Lake and Porter Counties, Indiana; Will County, Illinois and in the communities of Chicago Heights, Harvey, Dalton and Riverdale, Illinois".

license without the purchaser agreeing to a covenant not to compete for advertising, other than churches, throughout almost all of WJOB's broadcast pattern in Indiana and Illinois and coerced Crawford into accepting such a covenant"; which covenant so unreasonably limited the opportunities of WYCA to obtain advertising revenue as to render WYCA's continued existence impossible without release from the restrictive covenant; that for the aforesaid purposes the defendants Colby Broadcasting Corporation and Julian Colby, the latter a substantial stockholder in and president of the corporation, compelled Crawford's Estate, in order to obtain a release from the restrictive covenant, to agree to make certain additional payments,[3] being a percentage of WYCA's advertising revenues, with a minimum monthly payment provided, and committed certain other additional acts, all for the ultimate purpose of driving WYCA out of business as an independent competitive factor in radio broadcasting.

The District Court, relying on this Court's recent decision in *Crest Auto Supplies, Inc.* v. *Ero Manufacturing Company*, 7 Cir., 360 F. 2d 896, grounded its dismissal of the action on the applicability of the *in pari delicto* doctrine. The court appraised the allegations of the amended complaint as:

> ". . . reveal[ing] the voluntary character of decedent's action in entering into the contract initially, he accepted the restrictive covenant to procure the assignment of the license. No facts are alleged indi-

[3] An amendatory agreement executed May 25, 1962, for this purpose also extended to September 13, 1969, the period during which Colby Broadcasting Corporation is to permit WYCA to use its antenna and tower, furnish space for studio and office purposes, and furnish electrical power and engineering personnel.

cating he was compelled to purchase the license in the first instance, with the restrictive covenant. That is the transaction which he entered into voluntarily, and therefore is under the ban of the pari delicto doctrine."

In this connection, the court concluded that the allegation that defendants "coerced Crawford into accepting such a covenant" is in the nature of a conclusion of law which the motion to dismiss does not admit. But, wholly apart from the question of whether, in view of the context in which such allegation is made, the court was correct in so concluding, the availability of the *in pari delicto* defense requires something more than that the party against whom it is asserted merely accepted a contract containing an illegal restraint instead of refusing to deal. *Simpson* v. *Union Oil Co.*, 377 U.S. 13.

The District Court's reliance on *Crest Auto Supplies, Inc.* v. *Ero Manufacturing Company, supra,* was therefore misplaced. In both *Crest* and *Perma Life Mufflers, Inc.* v. *International Parts Corporation,* 7 Cir., 376 F. 2d 692, also cited by defendants, neither of which was decided on the bare bones of a complaint,[4] the plaintiffs were shown to have engaged in conduct having the effect of encouraging and perpetuating the "wrong" with respect to which they later complained. They sought and acquired additional franchises containing the restrictions alleged to have been

[4] The summary judgment in *Crest* was entered upon consideration of the depositions of the plaintiffs and the affidavits filed by defendant, as well as the pleadings. 360 F. 2d 896, 900. In *Perma Life* the summary judgment was entered "on a voluminous record and after numerous protracted hearings". 376 F. 2d 692, 693.

illegal. They cooperated with the defendants in the very conduct for which they later sought recovery. Desirous of bettering their own economic positions the plaintiffs embraced the proposition offered by the defendants. Thus, neither *Crest* nor *Perma Life* is dispositive here.

We believe it clear that the mere fact that a plaintiff has entered into an agreement which imposes an unlawful restraint upon him does not sustain the *in pari delicto* defense as a matter of law. The question to be resolved in determining the applicability of that defense is whether the plaintiff was an active and willing participant in the unlawful restraint (*Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 7 Cir., 138 F. 2d 967) or simply a "victim" thereof (*Bales* v. *Kansas City Star Co.*, 8 Cir., 336 F. 2d 439, 444 and *Ring* v. *Spina*, 2 Cir., 148 F. 2d 647, 653).

Accordingly, we hold that the plaintiff's complaint is not vulnerable *on its face* to the *in pari delicto* defense. We express no opinion as to the merit of plaintiff's claim. Nor do we adjudicate the ultimate availability of the *in pari delicto* defense the defendants urge. We decide only that the complaint as tested by defendants' motion[5] is sufficient.

---

[5] Defendants' motion to dismiss urged as additional grounds that the suit is barred by limitations, that the restrictive covenant was valid as "reasonable", and that the amendatory agreement removing the restrictive covenant constitutes an accord and satisfaction. The District Court did not base its ruling dismissing the action upon any of these grounds. None of these defenses is established on the face of the complaint, without more, and defendants' Rule 12(b)(6) motion (Federal Rules of Civil Procedure, 28 U.S.C.A.) unaccompanied by supporting affidavit, served to establish no additional facts.

The judgment order of dismissal is reversed, and the cause is remanded to the District Court for further proceedings consistent herewith.

REVERSED AND REMANDED.

A true Copy:

Teste:

....

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 733

PERMA LIFE MUFFLERS, INC.
PERMA LIFE MUFFLERS OF ARLINGTON, INC.
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.
PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.
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CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS
PIERCE MUFFLER SHOPS, INC.

Petitioners

v.

INTERNATIONAL PARTS CORPORATION
MIDAS, INC.
POWELL MUFFLER CO. INC.
MUFFLER CORPORATION OF AMERICA
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER, ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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In the

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Preliminary Statement

Respondents contend that the Court has no jurisdiction because the Petitioners failed to file the certified record provided for by Rule 22-3 of the Court's rules within the time prescribed by Section 2101(c) of Title 28 of the United States Code. They have even attempted to create the impression that the record has never been filed. This is not true. The certified record has been filed, and a request for

that record to the Court of Appeals was made prior to filing the Petition for Certiorari. The Court of Appeals, however, could not provide the record to file it together with the Petition. The failure to file a record however, does not constitute a jurisdictional defect inasmuch as the Petition itself was filed in time.

RESPONDENTS HAVE PRESENTED NO SUBSTANTIAL REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

Respondents' Brief in Opposition to the Petition for Certiorari rests on a completely false foundation. The authorities and the record references which Respondents cite do not support their principal contentions, first that the *in pari delicto* defense is "firmly established" in antitrust cases, and second that the facts in this case make the application of the *in pari delicto* defense particularly appropriate.

I

Respondents cite a number of this Court's decisions to support their assertion that the *in pari delicto* defense is "firmly established" in antitrust cases. (Respondents' Brief at 12) These decisions, however, do not support that position. There is no "firmly established" defense of *in pari delicto* in antitrust cases.

It is enough to say that *Gibbs v. Baltimore Gas Co.*, 130. U.S. 396 (1889) and *Harriman v. Northern Securities Co.*, 197 U.S. 244 (1905) were not antitrust cases in the real sense of the word. Respondents' use of *Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S. 359 (1927) appears to be a deliberate attempt to mislead. Respondents assert that in Eastman Kodak this Court "recognized" the *in pari delicto* defense "with approval". This is not so. Moreover, the language from this Court's opinion in that case (which the Respondents quote to support such assertion) is nothing more than this Court's resume of a jury instruction given by the District Court. In other words the quoted language repre-

sents part of this Court's statement of facts. The language does not represent either this Court's "recognition" or this Court's "approval" of the *in pari delicto* defense.

Southern Photo had won an award of treble damages under Section 7 of the Sherman Act. The Court of Appeals affirmed. Eastman asked this Court to review the decision. It challenged the competency of the proof offered by Southern as a measure of Southern's damage. John W. Davis, Eastman's attorney, argued that Southern could not use the profits it had earned as Eastman's customer to measure its losses for the period after Eastman refused to continue dealing with Southern, alleging, among other things, that Southern had during the prior period participated with Eastman in its unlawful monopoly. Nonetheless this Court affirmed the jury's treble damage verdict stating that "under the circumstances of this case" there was nothing in the trial court's "instructions [one of which was of an *in pari delicto* nature] of which [Eastman could] justly complain." [273 U.S. at 377-378]. Suffice it to say that this Court did not pass upon the validity of the *in pari delicto* instruction since the Court affirmed the judgment which Southern had won below, in spite of – and not because of – this instruction.

This Court's decisions beginning with *Kiefer-Stewart v. Joseph E. Seagram*, 340 U.S. 211 (1951) and ending with *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964) do not hold, as the Respondents assert, ". . . (1) that the *in pari delicto* defense does not apply unless both plaintiff and defendant were engaged in the identical alleged violation, and (2) that it does not apply if one of the parties to the alleged illegal agreement has been 'coerced' into participation." (Respondents' Brief at 13-14). Respondents' assertion to this effect represents a misconstruction of these cases. This Court has never sustained the *in pari delicto* defense in any of the antitrust cases which it has decided.

The cases beginning with *Kiefer-Stewart*, supra, and ending with *Simpson*, supra, are reviewed in the Petition for Certiorari and there is no need for extended rediscussion of

these authorities here. The most that Respondents can say about those cases is that the facts in some but not all of them were different from the facts in the case at bar. *Simpson*, supra, however, and the case at bar are almost precise parallels. The fact that Union Oil's sales exceeded $347,000,000 is of little consequence. Respondent MIDAS was and is a significant distributor of automotive exhaust system parts whose business ran into millions of dollars. Indeed, the corporate Respondents represented at the time pertinent to this cause the fifth largest distributor of automotive exhaust system replacement parts in the nation. To be sure some exhaust system parts were available from other suppliers. The MIDAS Muffler however was not. And, to buy the MIDAS Muffler, Petitioners here were required to buy other exhaust system parts from the Respondents. They had no alternative to dealing with the Respondents if they wanted to buy and retail the MIDAS Muffler.

II

Respondents' assertion that the application of the *in pari delicto* defense is particularly appropriate in the instant case (Respondent's Brief at 16) is as misleading as their assertion that such a defense is "firmly established" in antitrust law.

If the Respondents are correct, they have a right, free of private litigation, to offer a valuable product for sale on the condition that purchasers agree to observe understandings specifically condemned by Section 3 of the Clayton Act, i.e. that purchasers will not (1) deal in the goods of competitors and (2) will buy exclusively from the defendants. Respondents justify their assertion by claiming that purchasers who have agreed to these conditions are *in pari delicto* and have no right to sue because they ". . . freely, *voluntarily and without coercion* participated in and *profited from the very activities* claimed to be violative of the antitrust laws. . . ." [emphasis supplied] These overgeneralized views of the Respondents ignore the practical realities and economics which surround their franchise

system of distribution. Petitioners, for example, have never claimed and do not now claim that there was anything unlawful about their purchases or sales of the Respondents' MIDAS Muffler alone; or Petitioners have never claimed that there was anything unlawful about the advertising which they published as part of the Respondents' franchise system. Plaintiffs have never even denied that they profited from their sales of the respondents' MIDAS Muffler. Respondents, however, have taken these facts and put them in a different context. They argue that since Petitioners voluntarily purchased Respondents' MIDAS Mufflers and profited therefrom, the Petitioners voluntarily participated in and profited from *unlawful activities*. Respondents gloss over the fact that Petitioners accepted the Respondents' exclusive dealing franchises in order to obtain and retain the right to buy Respondents' MIDAS Muffler; and that Petitioners' profits were derived from the sale of Respondents' MIDAS Muffler. Throughout this proceeding Respondents have conscientiously ignored the fact that they required Petitioners to pay more for exhaust system parts other than mufflers than Petitioners would have paid had they purchased these parts from the Respondents' competitors. The vice of the Respondents' argument is that it proceeds on the assumption that there is nothing wrong with compelling franchisees to adhere to the unlawful terms of an agreement. Their argument appears to be that since Petitioners' purchases of exhaust system parts other than mufflers were enforced pursuant to an agreement which was voluntarily entered into in the first instance there was nothing "coercive" about those purchases. Lest there be any doubt about the coercive aspects of the Respondents' exclusive dealing agreements one need merely refer to the Court of Appeals opinion below (Appendix B at 17, Petition for Certiorari):

> "We think the finding, [of the District Court] 'The evidence is uncontroverted in demonstrating that plaintiffs were free to purchase either product, but chose Midas', is erroneous. Plaintiffs' freedom in

> this respect was forfeited by the terms of the franchise agreements. The record contains much evidence that there was a continuing effort on the part of Midas to enforce the exclusive dealer requirement."

Again, the facts which establish coercion are cited in the Petition for Certiorari and there is no need for an extended rediscussion of these facts here. We do not think that any Court, particularly this one, has ever accepted the argument that when an agreement is voluntarily entered into in the first instance it does not matter what coercive influences are subsequently utilized to enforce the unlawful terms of that agreement. Yet this is precisely the rub of Respondents' argument; nor does the fact that each party had the right to terminate the franchise agreement on thirty days notice aid this argument.

Respondents make the assertion in their brief that the "purpose of the antitrust laws" will be furthered by application of the *in pari delicto* doctrine in this case. (Respondents Brief at 22) The assertion is made without exception. We do not understand it, particularly in light of the fact that the respondents are charged with, among other things, a *per se* type violation of the antitrust laws – the use of a tying agreement. The nation's antitrust policy is firmly disposed against the use of such devices, (which "serve hardly any purpose beyond the suppression of competition." *Northern Pacific Railway Company v. United States*, 356 U.S. 1 at p. 6 (1958). This policy will not be furthered by allowing the Respondents to maintain the position that they are not subject to the liabilities of a private action. In this regard the language of the Government's *amicus* brief in *Amplex of Maryland, Inc. v. Outboard Marine Corporation*, No. 668 is in point (at page 4):

> "In view of the variety and scale of the nation's commerce, it would be virtually impossible for the Government to discover, investigate and proceed against every scheme proscribed by the antitrust laws. Private treble damage suits serve the impor-

> tant public purpose of supplementing the government's enforcement activities and thus play a major role in obtaining compliance with those laws. It is therefore a matter of concern to the United States when private enforcement of the antitrust laws has proven ineffective in any significant respect. Such a situation has developed with respect to the proscription of exclusive dealing arrangements."

III

Several other points must be noted. At page 18 in their Brief, Respondents carefully overlook the fact that they terminated Petitioner PIERCE solely because he refused to purchase all of his tailpipes and exhaust pipes from them. Respondents also overlook the circumstances under which the Petitioners terminated their franchises. Petitioners generated profits from their sale of the Respondents' MIDAS Muffler, prior to 1959. One of the paramount reasons for this was the unique guarantee offered by the Respondents. Respondents' cost of the guarantee program in late 1958, when guarantee returns came pouring in at an alarming rate, increased tremendously. To bridge this tide Respondents transferred the cost of the guarantee program to their franchisees by requiring them to defray 50% of the wholesale price of each muffler replacement. This 50% equalled (approximately) Respondents' entire manufacturing cost of the Muffler replacements. At the 50% rate Petitioners' profits were reduced by $60,000 in 1959 alone. Petitioners recognized that if this rate continued there would be no profits left from their sale of the Respondents' MIDAS Muffler. The guarantee change amounted to a constructive termination especially in light of the fact that Petitioners were already paying Respondents more for some exhaust system parts than they should have paid (or would have paid) Respondents' competitors. Petitioners could not seek substitutes without terminating their franchises in view of the threats previously made by Respondents. To have purchased from competitors without terminating their fran-

chises in an orderly fashion would have produced nothing more than chaos.

At page 24 of their Brief Respondents assert that their franchise agreements do not fall within the spirit of Section 1 of the Sherman Act, 15 U.S.C. 1. They contend that in the complaint Petitioners asserted nothing more than a "*horizontal conspiracy*" [their emphasis not ours]. This is factually incorrect. In the complaint petitioners asserted the following:

"COUNT ONE

> "During the period beginning about January 1, 1955, to and including the date hereof, the defendants and other co-conspirators unknown violated Section 1 of the Sherman Act (15 U.S.C. 1) in that they have combined together, and/or agreed, and/or contracted, and/or planned, and/or conspired to unlawfully restrain and substantially lessen competition in the sale of automobile exhaust parts and allied automobile products as hereinbefore defined in interstate commerce, or contracted, and/or planned, and/or conspired unlawfully to fix and maintain prices of automotive exhaust parts and to create and/or induce a commercial boycott and/or boycotts, the effects of which were to unlawfully restrain and substantially lessen competition in the sale of automotive exhaust parts and allied automobile products as hereinbefore defined in interstate commerce."

Thereafter the Petitioners alleged the divers means methods and acts by which Respondents violated Section 1. Among the acts which Petitioners alleged in addition to a conspiracy among Respondents were the Respondents' acts of entering into franchise agreements with hundreds of franchisees. These agreements are the subject of Petitioners' Sherman Act claim as well as Petitioners' Clayton Act claim. Respondents' reliance that the Complaint is based simply on a "horizontal conspiracy" rather than vertical agreement represents another fundamental misconception

by Respondents of the nature of the complaint. The complaint must be read in its entirety and cannot be divided into individual unrelated pieces.

CONCLUSION

We believe the record shows a clear violation of the antitrust laws as well as the right to recover. We respectfully request that Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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No. 733

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

PERMA LIFE MUFFLERS, INC.
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CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS
PIERCE MUFFLER SHOPS, INC.

PETITIONERS

v.

INTERNATIONAL PARTS CORPORATION
MIDAS, INC.
POWELL MUFFLER CO. INC.
MUFFLER CORPORATION OF AMERICA
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,
ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' BRIEF

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PETITIONERS' BRIEF

OPINIONS IN THE COURTS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 376 F.2d 692 (C.A. 7, 1967) and appears in the Joint Appendix at 203 et seq.

The Opinions of the United States District Court for the Northern District of Illinois, Eastern Division, are reported at paragraphs 71,801 and 71,802 in 1966 CCH Trade Cases

and appear in the Appendix at 108, et seq., and at 116* et seq.

JUDGMENTS BELOW AND JURISDICTION

This Writ grows out of a three-count[1] civil antitrust complaint which Petitioners filed in the United States District Court for the Northern District of Illinois, Eastern Division, in August, 1960 [16-45].

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit. The Circuit Court [223] affirmed in part and reversed in part[2] and entered judgment on April 25, 1967. The Circuit Court denied a petition for Rehearing En Banc[3] on June 7, 1967.

This Court granted Petitioners' Petition for Writ of Certiorari on January 15, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The statutes involved are Section 1 of the Sherman Act, 15 U.S.C. 1, Section 3 of the Clayton Act, 15 U.S.C. 14, and Section 4 of the Clayton Act, 15 U.S.C. 15. These statutes are reprinted in Appendix A to this brief.

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*Unless otherwise specified all references hereinafter are to pages of the Appendix.

[1] The complaint alleged that Respondents violated Section 1 of the Sherman Act, 15 U.S.C. 1 (Count I), Section 3 of the Clayton Act, 15 U.S.C. 14 (Count II), and Section 2 of the Robinson-Patman Act 15 U.S.C. 13 (Count III).

[2] The United States Court of Appeals for the Seventh Circuit reversed the District Court's dismissal of Count III and remanded that Count for trial. This Petition is limited to a review of Counts I and II.

[3] Two Judges voted to grant the Petition for Rehearing [Appendix to the Petition for Writ at C-1].

QUESTIONS PRESENTED

The questions presented are:

1. May a Federal Court without trial immunize a major national franchisor from treble-damage liability to its franchisees under Section 4 of the Clayton Act (15 U.S.C. 15) on the sole ground that the franchisees are *in pari delicto* with the franchisor as a result of having executed the franchisor's standard form franchise agreement which the franchisor offered them as the only basis on which it would do business, where the franchisor, through coercive threats of franchise termination, compelled its franchisees to comply with provisions in its franchise agreement which required franchises to.

   (a) deal exclusively with the franchisor as a supplier of all goods offered for sale by the franchisees;

   (b) purchase non-trademarked "tied products" from the franchisor as a condition of purchasing the franchisor's trademarked and nationally advertised "tying product"; and

   (c) sell all products at prices fixed by the franchisor?

2. Does an ousted franchisee have a cause of action against his franchisor under Section 4 of the Clayton Act for damages resulting from termination of his franchise agreement by the franchisor because of the ousted franchisee's refusal to comply with the exclusive dealing provisions in the franchisor's standard form franchise agreement?

3. Does the franchise method of distribution of a major national franchisor which (1) enforces requirements in its standard form agreements that (a) franchisees deal exclusively with the franchisor, and (b) purchase tied products from the franchisor; and which (2) restricts the franchisees' right to establish the price at which they sell merchandise which they have purchased, constitute a violation of Section 1 of the Sherman Act and/or Section 3 of the Clayton Act?

4. Is proof of a conspiracy essential to state a cause of action under Section 1 of the Sherman Act, 15 U.S.C. 1, or

is proof of a written agreement in restraint of trade by itself, without proof of a conspiracy, sufficient to state such a cause of action?

STATEMENT OF THE CASE

A. The Pleadings.

This action [16-45] was brought under Section 4 of the Clayton Act, 15 U.S.C. 15, in the United States District Court for the Northern District of Illinois, Eastern Division by four[4] former franchisees of MIDAS, INC. (one of the Respondents herein). The complaint charged the defendants (Respondents herein) with having violated Section 1 of the Sherman Act, 15 U.S.C. 1 [17], and Section 3 of the Clayton Act,[5] 15 U.S.C. 14 [18] by requiring Petitioners (and other franchisees) through written franchise agreements [36-45] to (a) deal exclusively with Respondents [40], (b) buy tied products from the Respondents [40] and (c) sell at retail prices fixed by Respondents [42]. The agreements also prohibited sales for resale [178] or from locations other than those specified in such agreements [37]. Petitioners also charged that Respondents had restricted the nature and variety of the products[6] which they allowed Petitioners (and other franchisees) to purchase and sell [e.g. 31, 134, 136, 141, 177, 179, 191] and that Respondents had conspired among one another to unlawfully restrain trade and commerce among the several states [26].

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[4]For convenience the franchisees are referred to as Skarupa, Ross, Pierce and Wheeler. Either directly or through wholly-owned subsidiaries the "four" franchisees operated 15 separate muffler shops under 11 separate franchises [14-16].

[5]See footnote 1.

[6]Respondents would not sell Petitioners any products other than automotive exhaust system parts and would not allow Petitioners or other franchisees to sell other automobile parts such as brake parts, shock absorbers, windshields, etc. [e.g. 141, 177, 179, 191].

Respondents answered the Complaint admitting that they had entered into franchise agreements with Petitioners (and others) under one or more of several standard form versions of a License and Sales Agreement which they had promulgated. They denied that they had violated Section 1 of the Sherman Act, 15 U.S.C. 1, or Section 3 of the Clayton Act, 15 U.S.C. 1, or that they had entered into any conspiracy to restrain trade or commerce.

B. The Evidence.[7]

The relevant facts in the record may be summarized as follows:

(1) *The Franchise Agreements*

In 1955 International Parts, Inc. started a franchise program [67]. It offered preprinted franchise agreements with MIDAS, INC. (a wholly-owned subsidiary) to Petitioners and others. The agreement outlined the terms and conditions under which Respondents would permit franchisees to participate in the program which featured the sale of Respondents' "MIDAS Muffler," "free 15-minute service," and a "lifetime" muffler guarantee good at any one of a number of shops which Respondents franchised across the nation [68-69]. Respondents agreed to underwrite one hundred per cent of the product cost [42-43] for this guarantee.[8]

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[7]There was no trial. The record consists of depositions of the parties, material produced in response to Motions for Production, Answers to Interrogatories, the Complaint and the Answer.

[8]In 1959 Respondents reneged on their original promise to underwrite the complete cost of their guarantee on their Midas Muffler. To induce franchisees to accept their franchise agreement, Respondents offered a muffler guarantee good at any Midas franchisee in the nation. Respondents promised to reimburse franchisees 100% of their product cost for these replacements, i.e., to bear the full cost of their guarantee program except for labor (with respect to which franchisees were free to make a service charge). Respondents unilaterally reduced this

A typical preprinted franchise agreement contained the following provisions [36-45]:

I(a)

". . .Seller hereby grants to Buyer, . . . the exclusive right to handle and sell Seller's products . . . provided said products are purchased by the Buyer from the Seller at the following location: . . ."

* * *

II(c)

"Buyer covenants and agrees that he will not, during the continuance of this agreement, without seller's written consent, handle in said store any products other than those purchased from the seller, or render services except on such products. Buyer further covenants and agrees that he will devote all of his time to the operation of the shop covered by this franchise and that he will not engage in any other business or employment."

* * *

II(h)

"Upon the execution of this agreement, Buyer agrees to purchase an opening stock for said store amounting to not less than $_____ at cost to the Buyer, for which Buyer shall pay one-half in cash, the balance to be paid net tenth prox."

* * *

III(b)

"Buyer covenants and agrees that in selling said merchandise he will maintain the retail list selling price set by the respective automobile manufacturers for mufflers and exhaust parts, which list price will be published by seller."

* * *

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to a 50% obligation. Franchisees purchased replacements under Respondents' guarantee at 50% of cost [e.g. 129-130]. This charge equalled (approximately) Respondents' cost of production.

IV(a)

"(a) This agreement may be terminated at any time by either party upon giving the other thirty (30) days written notice of such intention prior to said termination date. . . ."

(2) *Reasons for Accepting the Agreement*

Petitioners (and others) accepted and executed Respondents' franchise agreements to acquire the opportunity to purchase and sell Respondents "MIDAS" Muffler [e.g. 138]. Respondents refused to sell this muffler to Petitioners (or others) until and unless they accepted and agreed to observe the terms of the franchise agreement [139].

Prior to accepting their first franchise agreements with MIDAS, INC., three[9] of the Petitioners herein were engaged for varying periods of time in the business of selling exhaust system parts, among other automobile parts. In the course of their business they had theretofore purchased some of their exhaust system supplies from International Parts, Inc., one of the Respondents herein [123]. They had also purchased from some of Respondents' competitors [123].

Petitioner Pierce accepted his first franchise agreement only after Respondents [124-125] suggested (1) that in the future they would refuse to sell him their International Brand Muffler (which carried substantially the same guarantee[10] as their MIDAS Muffler) and (2) that he would face stiff competition from their future franchisee if he refused. As a further "inducement" to Pierce (and also to Ross), Respondents told Pierce [129] that he could continue to purchase and sell other automobile parts (such as shock absorbers, in the case of Pierce, and automotive glass [56]

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[9]Pierce, Ross and Skarupa [e.g., 123-124].

[10]Respondents' "International" muffler also carried a "lifetime" guarantee. This guarantee was good only where purchased. Respondents would not sell their International muffler to "MIDAS" franchisees.

and springs [141], in the case of Ross) even though the terms of the franchise agreement prohibited such sideline business.

Respondents' national advertising [69] and their "lifetime" guarantee [68] coupled with Petitioners' own considerable local advertising[11] enabled Petitioner-Franchisees to earn profits from the sale of Respondents' MIDAS Muffler despite the fact that they were required to purchase exclusively from Respondents,[12] maintain prices fixed by Respondents[13] and were limited as to the locations from which, and the persons to whom, they could make sales.[14]

Soon after they had entered into their first franchises, Petitioners were made aware that their franchise agreement meant precisely what it said, i.e., that all franchisees were required to deal exclusively with Respondents and maintain prices fixed by Respondents.

Confronted with the prospect of losing the opportunity to purchase and sell the profitable MIDAS Muffler, petitioners submitted to the exclusive dealing and price-fixing requirements. Indeed, there was no alternative available to petitioners because to lose the franchise would mean to lose all substantial sums of money which they had invested

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[11] Ross invested $129,000 in advertising the Respondents' Muffler.

[12] Petitioners paid Respondents more for automotive exhaust system parts (other than mufflers) than they would have paid had they purchased these parts from Respondents' competitors [185-188, 189].

[13] Respondents would not allow Petitioners to price their exhaust system parts at competitive prices, and insisted on a "maintain-the-price" policy [197]. Some of Petitioners' competitors advertised and sold the "International" muffler which was (until 1959) physically identical to the "MIDAS" Muffler at prices which were substantially below the prices maintained by MIDAS [55].

[14] Respondents would not allow Petitioners to sell for resale, i.e., "wholesale" [179-180].

in advertising to promote the MIDAS Muffler [139]. Petitioners, therefore, observed the price-fixing requirements and purchased their tailpipes, exhaust pipes, clamps, and other supplies from Respondents even though the prices charged for these parts were substantially in excess of the prices which Respondents' competitors charged for these parts [185-188, 189].

(3) *Enforcement of the Agreement*

Through salesmen who inspected the franchisees' places of business, requirements of periodic financial reports, and analyses of purchase orders, Respondents maintained a close surveillance of the operations of these Petitioners (and other franchisees) in order to police compliance with the terms of their franchise agreements, particularly the exclusive dealing, tying, and price-fixing agreements. Respondents used subtle and sophisticated techniques ranging from covert threats of franchise termination [56, 133, 143] to full-blown termination in cases where actual threats proved ineffective, to compel Petitioners [201] and other franchisees [143, 177] to observe the exclusive dealing and price-fixing provisions in their franchise agreements.

The techniques utilized by Respondents to compel compliance are disclosed in the record.

Gordon Sherman (President of the Respondent MIDAS, INC.) described "basic MIDAS policy - exclusiveness" in one memorandum to his field counselors (nee salesmen) [July 1, 1957] as follows [176]:

> "THE MOST SACRED PRINCIPLE OF THE MIDAS PROGRAM . . ."
>
> "[This] also refers to any merchandise not carrying the MIDAS brand. . . . See to it that it is enforced and tell us where it isn't. Our policy in this matter is simply one of requiring that those people who are part of the program are part of it all the way."

Sherman reiterated "basic MIDAS policy" in subsequent memoranda [189] to his "field counselors" [August 13, 1958]:

> "TEXAS TAIL PIPE CO OF HOUSTON
>
> "I have attached to this bulletin a circular, a copy of which has been sent to all MIDAS shops.
>
> "The Texas Tail Pipe Co. of Houston is a bit of a scavenger (there is nothing wrong with being a scavenger except that we do not like them) to the muffler industry. These people make a small assortment of popular numbers and distribute them at unjustifiably low prices.
>
> "It is of course essential to participation in the MIDAS program that our dealers do not buy this merchandise."

Two months later [192] Sherman advised his "field counselors" [October 15, 1958]:

> "BUYING FROM OUTSIDE SOURCES
>
> "Several bulletins have gone forward to you describing the possible dereliction of some dealers in the direction of tail pipes and clamps of non-MIDAS origin. In a recent trip I had an opportunity to observe this felony and can now tell you what to look for.
>
> * * *
>
> ". . . We regard this kind of promiscuous buying as a capital offense in MIDAS. It is inexcusable and it is hostile in the extreme to the program. You cannot work with a dealer if this kind of thing prevails."

Respondents' "field counselors" secured compliance with the terms of the franchise agreement.[15] Field counselor Gurnick wrote franchisees within the area of his responsibility [193] including Petitioner Ross, as follows [October 15, 1958]:

[15] Petitioner Ross, for example, discontinued his "glass" business after receiving "advice" from Sherman's field counselor Gurnick that this was "against Midas policy" [56-57, 192].

"SHOP BUYING PRACTICES

"1) It is Midas policy that you buy your clamps exclusively from Midas.

"2) It is Midas policy that you buy your 'Hollywood Mufflers' from Midas.

"3) It is Midas policy that you buy your tailpipes from Midas.

"Your complete participation in the Midas Shop Buying Policy is requested.

"The next time I visit your shop, we can go into this matter more fully."[16]

Respondents initiated a project [195-196] of examining dealer orders to "isolate" those franchisees who were not "loyal." Sherman described this project as follows [March 25, 1959]:

"TAIL PIPE PURCHASES

"When a dealer signs a franchise with us he commits himself undeniably to certain basic practices in our program. Paramount among these is his consistent and exclusive purchase of our products. Our dealers have become so dedicated to our Muffler that I believe there is no question on this, but it is possible that some of them regard our tailpipes and our clamps as a kind of afterthought to which 'loyalty' does not apply. You have all been aware of certain

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[16] Later, Gurnick wrote Petitioner Ross [194] again in an "urgent memo," as follows [October 31, 1959]:

"Gordon Sherman advises you are not purchasing popular clamps from MIDAS.

"You are only purchasing a small quantity of special type clamps.

"The clamps are priced right, and even more important it is part of the policy to make such purchases from MIDAS.

"Please comply and cooperate in the future - if any ideas to the contrary please let me know. I have to report the results to Gordon Sherman."

tail pipe companies which manufacture short lines of easily produced numbers at discount prices.

* * *

"To help you isolate those dealers in need of attention along either of these lines I have indicated, we have been studying each and every MIDAS order as it is processed for shipment. We shall continue to do this indefinitely, it is this procedure that enables us to discover that for one reason or another some dealers are not buying enough pipes from us. We now have our first report on this project and are printing below the locations of those in question as follows: . . ."[17]

Petitioners testified to the techniques which Respondents utilized and reiterated their testimony in answers to Respondents' interrogatories. Petitioner Pierce, for example, testified [133]:

"Q. Well, my question at this point is directed not to shocks and springs and other products, but to exhaust systems only, such as Nu-Era or Texas Tailpipes, or what have you.

"A. Yes.

"Q. Would you explain these conversations for us?

"A. Well, Mr. Gordon Sherman came into my warehouses at one time and saw a shipment of Texas Tailpipes there and he was very unhappy about it.

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[17]Petitioner Pierce was among the franchisees isolated by this "project" [195].

Six months later [200] Pierce was the subject of a panel discussion at a sales meeting called by Sherman. At that meeting Sherman's salesman, Marc Vosc, discussed the subject assigned to him: "How much can we take from Joe Pierce?"

Two months later [201] Pierce's "nervous list of offenses" was the subject of a Sherman memo to his salesmen advising them that MIDAS, INC. had terminated Pierce's franchise.

"Q. What did he say?

"A. He said to me, he said, 'Joe,' he said, 'You know our franchise is just like a marriage, this is like cheating on your wife, it is grounds for divorce.' "

(4) *The Guarantee Program*

Toward the end of 1958, Respondents unilaterally announced that effective January 1, 1959, they would no longer honor guarantees on a full 100% cost basis [129]. The guarantee instead was reduced to 50% of Respondents' wholesale price. Petitioners (and other franchisees) were thereby forced to absorb 50% of the cost of all replacements they made even though any individual replacement might be made with respect to a muffler which the franchisee had not even installed in the first place. Thus franchisee Smith in Hoboken became liable for 50% of the product cost of replacing a muffler which franchisee Jones in Omaha had sold.[18]

(5) *Reappraisal of Program*

With the advent of the change in the guarantee program, all of the Petitioners reappraised their respective franchises.[19] Previously they had submitted to restrictive provisions of the franchise agreements in order to retain [e.g., 139] their right to sell the MIDAS Muffler and protect their substantial investments in local advertising of that product.[20] Petitioners were in an unusual position in that the more they invested in advertising Respondents' MIDAS Muffler, the more they were "laced into" the program. After Respondents changed their guarantee program in violation of their

[18]Respondents thus transferred the entire cost of *their* "lifetime" guarantee to Petitioners. Fifty per cent of the wholesale cost was approximately equal to Respondents' cost of production.

[19]In 1959 alone the change in the guarantee cost Petitioners collectively in excess of $60,000.

[20]See footnote 11.

original representations (and the provisions of the original franchise agreements), there was nothing more for the Petitioners to protect. They were faced with a radically altered profit picture. Their anticipated profits from sales of the MIDAS Muffler would be all but destroyed by losses generated through the new guarantee replacement program. The burden of paying Respondents more [185-188] for automotive exhaust system parts (other than mufflers) than they would have paid Respondents' competitors, coupled with the respondents' rigid resale price maintenance [55, 197] policies, further reduced the attractiveness of the Respondents' franchise since these policies rendered franchisees less able to compete on a profitable basis.

Respondents cancelled Petitioner Pierce's franchise in late 1959 because he refused to adhere to the exclusive dealing provisions in his franchise agreement [60, 200, 201]. Other Petitioners then terminated their franchises to avoid the dual burdens, first, of paying the Respondents more for non-trademarked exhaust systems parts (other than mufflers) than they would have paid had they purchased such parts from Respondents' competitors and, second, the "new" cost of the guarantee program.

Petitioners filed this antitrust action in August 1960. At that time Respondents were directing the activities of more than 260 dealers operating over 350 MIDAS Muffler Shops in 42 states. Respondents' uniform preprinted franchises for all these shops required exclusive dealing as well as resale price maintenance and provided other unlawful restrictions as a condition of doing business with Respondents and purchasing Respondents' MIDAS Muffler. Through the use of their franchise agreements, Respondents between 1955 and 1960 trebled their business volume to more than $17,000,000 annually. At the time this action was filed they were the nation's fifth-largest distributor of autmotive exhaust system parts for the replacement market.[21]

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[21] *United States v. A.P. Parts Co.*, CCH Trade Cases 1964, ¶ 71,255. In the 1960 complaint filed by the Department of Justice in

C. The Motion for Summary Judgment

Prior to trial [61-63], Respondents moved for summary judgment contending that Petitioners were *in pari delicto* with Respondents and therefore had no standing to sue under Section 4 of the Clayton Act, 15 U.S.C. 15. Respondents also urged dismissal of Petitioners' Sherman Act claim on the ground that Petitioners had failed to show a conspiracy as alleged in their complaint.

D. The Ruling of the District Court

The District Court granted Respondents' Motion for Summary Judgment. It said [109]:

> "It is clear from the undisputed facts before us, that each plaintiff voluntarily entered into the franchise agreement at issue and accepted the benefits therefrom. They are under the holding in *Rayco* and *Crest,* in pari delicto [with Respondents], and therefore unable to reap the harvest of their own misdeeds. Each [Petitioner] recognized that the franchise conveyed to him the right to use the various MIDAS trade names, trade marks and service marks, and each profited from the use of same. They are not now entitled to the high profit of a treble damage suit when they voluntarily acceded to, fostered and profited from the very practice about which they now complain."

The District Court also said that the multiple-corporate Respondents constituted [112] "in fact a single corporation," and held that as such they could not be conspirators.

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that case, Respondents here were described as the fifth-largest distributor of exhaust system parts for the replacement market in the United States with approximately 11% of the market. See also *United States v. Maremont Automotive,* CCH Trade Cases 1960, ¶ 69,881.

E. The Opinion and Judgment of the Court of Appeals

With one Judge dissenting, the United States Court of Appeals for the Seventh Circuit affirmed dismissal of Petitioners' Section 1 Sherman Act and Section 3 Clayton Act counts. It quoted the District Court's opinion, reviewed the facts and reached the conclusion that "coercion" could not [214] "have been a factor herein" since Petitioners *voluntarily entered into* their first franchises. "It would be difficult," the Court of Appeals said, "to visualize a case more apporpriate for the application of the *pari delicto* doctrine. We hold that it was properly applied and given effect by the District Court."

The Court of Appeals distinguished this Court's decision in *Simpson v Union Oil Co. of California,* 377 U.S. 13, 84 S.Ct 1051 (1964), reversing 311 F.2d 764 (C.A. 9, 1963) on the ground [212] that this Court did not mention *in pari delicto* in its opinion. The Court of Appeals confined this Court's decision in *Simpson,* supra, to the precise facts of that case and noted that this Court in that opinion said [212] that it intimated no views on any issue other than the legality of Union Oil's resale price maintenance through a coercive type of consignment agreement.

The Court of Appeals also accepted the District Court's finding that the multiple-corporate Respondents were a single business entity through which a family business was operated and concluded that Petitioners had failed to sustain their conspiracy charge.

Circuit Judge Walter J. Cummings, Jr. dissented [224]. In his opinion he called attention [224] to the fact that *Simpson v. Union Oil Co.,* supra, had never before been cited to the Seventh Circuit. He said that an examination of the briefs filed in *Simpson* convinced him that the Supreme Court would not accept the *in pari delicto* defense in this case [224]:

> ". . . As with these plaintiffs, Simpson had the freedom of choice 'to accept or reject the tendered lease

and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts.' He 'deliberately and knowingly enter[ed] into [the] contractual obligations' (311 F.2d 764, 768, 769). In *Simpson,* the Ninth Circuit used the *in pari delicto* theory to deny him any recovery. That point was fully briefed in the Supreme Court, which reversed, permitting Simpson to prevail. Therefore, I am forced to conclude that the Supreme Court rejected the *in pari delicto* defense. . . . "

Circuit Judge Cummings also said [226] that "this record" shows that MIDAS and International held themselves out as separate and "divorced." This fact, he said, "does not permit [Respondents] to claim that as a single business entity they were unable to conspire." Moreover, he said a conspiracy is not needed to support a Sherman Act claim.

Petitioners moved for a rehearing en banc. The Circuit denied this motion although Circuit Judges Swygert and Cummings voted to grant the Petition for Rehearing En Banc.

F. The Petition for Certiorari.

The Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit was filed in this Court on October 17, 1967. By order dated January 15, 1968, this Court granted review.

SUMMARY OF ARGUMENT

The District Court applied the *in pari delicto* doctrine to legitimatize the franchise system of distribution of a major national franchisor who forced its franchisees to purchase "tied products," required its franchisees to deal exclusively with the franchisor, and fixed the retail prices at which franchisees sold the franchisors' products. The Court below affirmed. Its decision in effect authorizes a private exemption for franchisors from the provisions of the antitrust laws. It reasoned that once a franchisee voluntarily *enters into* a franchise agreement which spells out competitive restrictions the franchisee cannot thereafter complain even though the

competitive restrictions transgress the boundaries defined by both the Sherman and Clayton Acts.

This view of Section 4 of the Clayton Act cannot stand. The *in pari delicto* doctrine is inapplicable to treble damage actions brought under that Section. The Court's decision virtually destroys Section 4 as a weapon for enforcement of the antitrust laws. It authorizes franchisors to regiment thousands of franchisees in methods of merchandise distribution which clearly conflict with antitrust policy.

Under the theory of the Court below franchisees cannot complain even though their franchisor compels adherence through threats of franchise termination. This view cannot stand either. The Respondents' franchise agreement as used by the Respondents in this case constitutes a coercive device which is unlawful within the meaning of this Court's decision in *Simpson v. Union Oil of California*, 377 U.S. 13, 84 S.Ct. 1051 (1964).

The court below also affirmed summary judgment on the ground that Petitioners had failed to show a conspiracy within the meaning of Section 1 of the Sherman Act and implied that a conspiracy was essential to state a cause of action under that Section. This decision conflicts with the authorities which hold that proof of a conspiracy is not essential to state a claim under Section 1 of the Sherman Act. Moreover, the facts here show "an agreement" in restraint of trade condemned by the Sherman Act as well as a conspiracy.

The District Court's decision in granting summary judgment denied Petitioners a decision on the merits of their claim despite the fact that issues of fact existed. The existence of genuine issues of material fact precluded summary judgment.

ARGUMENT

I

THE RESTRAINTS WHICH THE RESPONDENTS EFFECTED BY THEIR FRANCHISE AGREEMENTS ARE PRECISELY THE TYPES OF RESTRAINTS WHICH THE SHERMAN AND CLAYTON ACTS WERE DESIGNED TO PREVENT.

The Respondents' use of the franchise agreements to achieve exclusive dealing, force the sale of tied products, fix retail prices, and restrict the areas within which, as well as the persons to whom, purchasers could sell Respondents' products, represents a classic example of conduct which the Sherman (15 U.S.C. 1) and Clayton (15 U.S.C. 14) Acts were intended to reach. *Standard Oil of California v. United States,* 337 U.S. 293, 69 S.Ct. 1051 (1959) [exclusive dealing contracts]; *Standard Fashion v. Magrane-Houston Co.,* 258 U.S. 346, 42 S.Ct. 360 (1922) [exclusive dealing contracts]; *Federal Trade Commission v. Brown Shoe Co.,* 384 U.S. 808, 86 S.Ct. 1501 (1966) [exclusive dealing contracts]; *Northern Pacific Railway Company v. United States,* 356 U.S. 1, 78 S.Ct. 514 (1958) [tying agreements]; *United States v. Loew's,* 371 U.S. 38, 83 S.Ct. 97 (1962) [tying agreements]; *Anchor Serum v. Federal Trade Commission,* 217 F.2d 867 (C.A. 7, 1954) [exclusive dealing agreements]; *Osborn v. Sinclair Refining Co.,* 286 F.2d 832 (C.A. 4, 1961) [exclusive dealing agreements]; *United States v. Parke, Davis & Co.,* 362 U.S. 29, 80 S.Ct. 503 (1960) [price-fixing]; *Simpson v. Union Oil Co. of California,* 377 U.S. 13, 84 S.Ct. 1051 (1964) [price fixing]; *United States v. Arnold, Schwinn & Co.,* __ U.S. __, 87 S.Ct. 1856 (1967) [resale restrictions]; *United States v. General Motors,* 384 U.S. 127, 86 S.Ct. 1321 (1966) [resale and territorial restrictions]; *United States v. Sealy, Inc.,* __ U.S. __, 87 S.Ct. 1847 (1967) [territorial restrictions].

A. Unlawful Exclusive Dealing (Requirements Contracts) and Tying Arrangements.

The record in this case clearly shows the use of unlawful exclusive dealing and tying arrangements. One need merely compare the exclusive dealing language in one of Respondents' typical franchise agreements with the language of Section 3 of the Clayton Act (15 U.S.C. 14) to appreciate the nature of the restraint which the Respondents effected through the use of their franchise agreement:

II(c) of Typical Franchise Agreement [40]	Section 3 of the Clayton Act (15 U.S.C. 14)
"Buyer covenants and agrees that he will not . . . handle . . . any products other than those purchased from the seller. . . ."	"It shall be unlawful for any person . . . to contract for the sale of goods . . . on the condition . . . that the purchaser . . . shall not . . . deal in the goods . . . of a competitor. . . ."

Since the Respondents refused to sell their MIDAS Muffler to anyone unless he first executed a preprinted franchise agreement containing the foregoing provisions, Respondents effectively tied the sale of unlabeled, non-trademarked exhaust system parts (principally tailpipes, exhaust pipes and clamps) to the sale of their MIDAS Muffler. The tied products were integral parts of an exhaust system, and therefore essential to the franchisees' business.

Absent paragraph II(c) of the typical franchise agreement, franchisees, including Petitioners, would have been able to purchase the non-trademarked exhaust system parts such as tailpipes, exhaust pipes, and clamps from competitors of Respondents at significantly lower prices [185-188, 189, 195]. Through the franchise device Respondents were able to force their franchisees to deal exclusively with them and, at the same time, foreclose competitors [154, 158] from a substantial share of commerce in exhaust system parts. Moreover, since Respondents' prices for exhaust system parts were greater than the prices of their competitors, the arrangement had no redeeming quality. *United States v. Loew's,*

supra; *Standard Oil Company of California v. United States*, supra; *Northern Pacific Railway Company v. United States*, supra.

Respondents' exclusive dealing requirements and tying agreements are precisely the type of restraint which Section 1 of the Sherman Act and Section 3 of the Clayton Act were intended to stop. *Standard Oil Co. of California v. United States*, supra; *Standard Fashion v. Magrane-Houston Co.*, supra; *Federal Trade Commission v. Brown Shoe Co.*, supra; *Northern Pacific Railway Company v. United States*, supra; *United States v. Loew's*, supra; *Anchor Serum v. Federal Trade Commission*, supra; *Osborn v. Sinclair Refining Co.*, supra.

B. Unlawful Price-Fixing.

Through subparagraph (b) of Article III [42] of their typical franchise agreement Respondents effected an unlawful price-fixing scheme by requiring franchisees to ". . . maintain the retail list selling price . . . for mufflers and exhaust parts . . . published by seller. . . ." This system of price-fixing agreements which Respondents utilized in interstate commerce, for the purpose of fixing the amount consumers would pay, eliminated competition and was illegal per se. *United States v. Parke, Davis & Company*, supra; *White Motor Company v. United States*, 372 U.S. 253, 83 S.Ct. 696 (1963).

The record shows that this provision applied to unlabeled non-trademarked exhaust system parts [162-163] as well as to Respondents' MIDAS Muffler. Respondents cannot claim a fair trade exemption. They cannot even assert that they did not require their franchisees to sell at prices which they fixed since the record contains numerous references by Respondents [179, 181, 197] to their "maintain-the-price merchandising" policy which forbade the practice of discounting or "wholesaling."

Where express agreements are employed to compel maintenance of retail prices for the purpose of regimenting a

marketing system and coercive means are used to enforce price obedience, an unlawful price-fixing plan exists. *United States v. Parke, Davis & Company,* supra. Respondents' use of franchise agreements in the instant case to compel price conformity parallels the use of consignment agreements for that purpose, which this Court condemned in *Simpson v. Union Oil of California,* supra. There, Mr. Justice Douglas speaking for the Court in this case said:

> "We made clear in United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505, that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. We reiterate that view, adding that it matters not what the coercive device is. United States v. Colgate, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992, as explained in Parke, Davis, 362 U.S. at 37, 80 S.Ct. 503, 4 L.Ed. 2d 505, was a case where there was assumed to be no agreement to maintain retail prices. Here we have such an agreement; it is used coercively, and, it promises to be equally if not more effective in maintaining gasoline prices than were the Parke, Davis techniques in fixing monopoly prices on drugs." (at 17)

C. Unlawful Territorial and Other Restrictions

The unlawful territorial and other restrictions placed upon franchisees by the Respondents as part of the franchise agreement, fall well within the classes of restraints this Court recently condemned in *United States v. Arnold, Schwinn & Company,* supra. See also *United States v. Sealy, Inc.,* supra and *United States v. General Motors,* supra. Respondents required franchisees to "purchase" and pay for a minimum opening stock at the time they granted a franchise. Under the agreement, franchisees were given the right (1) to purchase Respondents' products for resale [37] from a location or locations specifically designated in the franchise agreement (2) at prices fixed [42] by Respondents. Franchisees were thus restricted with reference to the areas within which they

could sell merchandise which they had in fact *purchased* from Respondents. Moreover, in view of the price restrictions and prohibitions against wholesaling, franchisees were also limited with reference to the persons to whom they could sell merchandise which they had *purchased* from the Respondents.

In *Arnold, Schwinn & Company*, supra, this Court held that a manufacturer violated Section 1 of the Sherman Act when it made sales to retailers on *any* condition, agreement, or understanding limiting the retailers' freedom as to where and to whom retailers would resell products. At __ U.S. __ U.S. __, 87 S.Ct. 1864, the Court said:

> ". . . restraints as to territory or customers, vertical or horizontal, are unlawful if they are 'ancillary to price-fixing' (White Motor Co. v. United States, supra, 372 U.S. at 260, 83 S.Ct. at 700) or if the price fixing is 'an integral part of the whole distribution system' (Bausch & Lomb, supra; 321 U.S. at 720, 64 S.Ct. at 812). In those situations, it is needless to inquire further into competitive effect because it is established doctrine that, unless permitted by statute, the fixing of prices at which others may sell is anticompetitive, and the unlawfulness of the price-fixing infects the distribution restrictions."

Respondents' own memoranda demonstrate the nature and extent of these restrictions. The record, for example, shows that Gordon Sherman (President of the Respondent MIDAS) instructed his field counselor about Respondents' policies [178] against "wholesaling" and "sub-agenc[ies]" and ordered them to give [their] "initial attentions" to MIDAS supplier[s] and sub-agent[s].

D. Impact of Restraints

The combination of restraints which the Respondents imposed upon franchisees as consideration for extending them the opportunity to sell Respondents' MIDAS Muffler go far beyond the activities which the Sherman and Clayton Acts permit. The impact of these restraints can be best under-

stood if examined in the context of the economic framework within which they occurred. The salient facts are that Respondents were the fifth-largest distributor of automotive exhaust system parts for the replacement market in the United States. As of the date of the complaint, 1960, their wholesale sales exceeded 17 million dollars annually. Sales were made primarily through franchise outlets whose activities were restricted in exactly the same fashion as these Petitioners. It is noteworthy that Respondents' largest competitor, Goerlich, Inc., engaged in precisely the same type of practices as these Respondents. Its activities were the subject of an antitrust complaint by the Department of Justice. Following the complaint this competitor entered into a consent decree which prohibited the activities which are identical to the activities which are the subject of the complaint in this proceeding.[22]

By contrast with Respondents, Petitioners here were small, independent, starry-eyed venturers eager to build local businesses. According to Respondents, one of the Petitioners (Skarupa) was no more [76] than a $7,700-a-year "government clerk," while another (Wheeler) was [99] a $6,000-a-year poolroom operator. The resources which the individual Petitioners were able to muster at the time they succumbed to the romantic lure of Respondents' franchise program can hardly be compared with the resources available to Respondents, whose business exceeded several million dollars annually. One could hardly conclude that Petitioners or any other franchisees bargained as equals the terms

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[22]See *United States v. A.P. Parts Corporation and Goerlich's, Inc.*, CCH Trade Cases 1964, ¶ 71,255. The Consent Order there set forth reads in pertinent part as follows:

> "The defendants are each enjoined and restrained from selling or contracting to sell any automotive exhaust system parts to any distributor or jobber upon the condition, agreement, or understanding that the purchaser shall not deal in automotive exhaust system parts manufactured by any person other than the defendants."

of the Respondents' franchise agreement. Indeed, the whole theory of franchising rests on the concept that the franchisor and the franchisee are not equals.[23] Franchises are presumably designed to enable the small venturer to enter the business field with the help and assistance of the franchisor, who is able to lend business acumen and financial assistance.

One other economic fact is significant to the proceeding: many suppliers of exhaust system parts who were competing with the Respondents were [189] substantially smaller than the Respondents. Through the use of exclusive dealing agreements, Respondents were able to prevent these smaller suppliers from gaining a foothold in this line of commerce, despite the fact that these suppliers regularly offered exhaust system parts to Petitioners and other franchisees at prices substantially below the Respondents' prices [154, 189].[24]

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[23] "The Franchise System of Distribution," Edwin H. Lewis & Robert S. Hancock (1963).

[24] The fact that Petitioners were forced to pay Respondents more for automotive exhaust system parts (other than mufflers) than they would have had to pay if they had purchased such from Respondents' competitors demonstrates the damages incurred by Petitioners. *Lessig v. Tidewater Oil Co.*, supra; *Osborn v. Sinclair Refining Co.*, supra.

II

THE DOCTRINE OF "IN PARI DELICTO" DOES NOT BAR FRANCHISEES FROM BRINGING AN ACTION FOR TREBLE DAMAGES UNDER THE ANTITRUST LAWS.

A. Violations of Section 1 of the Sherman Act.

The doctrine of *in pari delicto* does not prevent Petitioner-franchisees from bringing a treble-damage action against Respondent-franchisors under Section 1 of the Sherman Act, 15 U.S.C. 1. *Simpson v. Union Oil Company of California,* supra.

In *Simpson,* supra, Union Oil argued that the doctrine of *in pari delicto* barred an action under Section 4 of the Clayton Act (15 U.S.C. 15) alleging violations of the Sherman Act. Union Oil contended that since the plaintiff and defendant were parties to the same illegal agreement upon which the suit was grounded Simpson did not have standing to sue. The Ninth Circuit accepted Union Oil's argument and affirmed the District Court's judgment granting defendant's motion for summary judgment. The Ninth Circuit assumed [but did not decide] that Union Oil's consignment agreement was violative of the Sherman Act, and held that Simpson was precluded from recovering damages because Simpson knew that by obtaining a lease from Union Oil he would also be required to sign a restrictive consignment agreement. Since he had freedom of choice to accept or reject the tendered lease and consignment agreement, Simpson entered into these arrangements with his eyes open and with full knowledge of the facts. The Ninth Circuit reasoned that any damage sustained by Simpson was the result of Simpson's own acts. This Court reversed, stating (at p. 16):

> "We disagree with the Court of Appeals that there is no actionable wrong or damage if a Sherman Act violation is assumed. If the 'consignment' agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and,

> in any event, to sell at competitive prices. *The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws.*" [Emphasis supplied.]

In the instant case the Court below sought to limit *Simpson* to its specific facts and to distinguish the facts therein from the facts in the case at bar. The Court below also relied upon the fact that there was no express mention of *in pari delicto* in the Court's opinion in *Simpson*. *Simpson*, however, cannot be read, as the majority of the Court below apparently did, without reference to the opinion which it reversed [311 F.2d 764 (C.A. 9, 1963)]. As pointed out above, Simpson's antitrust claim was denied in the Ninth Circuit for precisely the same reasons which the majority of the Court below used to deny the claims of these Petitioners. *In pari delicto* was fully argued in briefs by both Simpson and Union Oil in this Court.

We submit that in *Simpson*, supra, this Court held not only that Union Oil's consignment agreement was unlawful, but also that antitrust plaintiffs are not barred from bringing actions for violation of the antitrust laws under Section 4 of the Clayton Act simply because they have previously accepted agreements binding them to follow price schedules fixed by their suppliers, where their suppliers require such agreement as a condition of doing business.

The facts in the instant case are nearly parallel to *Simpson*.[25]

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[25]The Court below said that *Simpson* and the case at bar were "a far cry" from one another. [214]

Simpson v. Union Oil Co.	Case Before the Court
1. Simpson sued Union Oil under Section 4 of the Clayton Act charging that defendants had violated Section 1 of the Sherman Act.	1. Petitioners sued under Section 4 of the Clayton Act charging that Respondents had violated Section 1 of the Sherman Act.[26]
2. Simpson complained that Union Oil required him to sell at prices which Union fixed.	2. Petitioners complained that Respondents required them to sell merchandise which they had purchased from Respondents at prices which Respondents fixed.[27]
3. Union Oil used its service station leases as a tying device. It tied its leases to its gasoline consignment agreements in order to promote its price-fixing policies.	3. Respondents used their franchise agreement as well as the MIDAS Muffler as tying devices. These devices were used to promote Respondents' price-fixing policies and to compel the purchase of tied products such as non-trademarked tailpipes, exhaust pipes, muffler clamps, hangers and Hollywood Mufflers.

[26] In addition, Petitioners alleged violations of Section 2 and 3 of the Clayton Act (15 U.S.C. 13, 14).

[27] Petitioners also alleged that they had been required to deal exclusively with Respondents' purchase tied products from the Respondents, and that Respondents had discriminated with respect to the terms and discounts on which they sold automotive exhaust system parts to Petitioners and other of their customers.

4. Simpson accepted Union Oil's consignment agreement and lease with full knowledge that he was required to sell at prices fixed by Union Oil. This was the only basis on which Union Oil would do business with Simpson.

4. Petitioners accepted the unlawful restrictions in Respondents' franchise as the only basis on which Respondents would do business with Petitioners. One Petitioner, Pierce, accepted Respondents' franchise only after he was threatened with enfranchisement of a competitor as a Midas dealer, and with the sale of the International Muffler to his competitors.[28]

5. Union Oil threatened to discontinue business relations with Simpson and refused to renew Simpson's lease because Simpson refused to adhere to defendants' price-fixing policies.

5. Respondents threatened to terminate Petitioners' franchises if they refused to adhere to Respondents' price-fixing, exclusive dealing and tying policies. Respondents terminated the franchise of the Petitioner Pierce when he refused to deal exclusively with the Respondents and buy their tied product.[29]

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[28] At the time Respondents offered him a Midas franchise, Petitioner Pierce was already buying Respondents' "International" brand muffler. Respondents suggested they would start selling the "International" muffler to someone else if he refused to accept the franchise agreement [124-125].

Petitioner Ross was selling automobile glass at the time he accepted Respondents' franchise. Respondents promised that he could continue his profitable business of selling glass [56].

[29] In 1958 Respondents also changed the rules on Petitioner Ross and threatened to terminate his franchise if he continued selling glass [56-57, 191]. Ross, who invested thousands of dollars ($129,000) in advertising Respondents' muffler discontinued the sale of glass to protect his investment in Respondents' muffler [139]. Still later, after Respondents changed the terms of their guarantee and terminated Pierce, Ross terminated his franchise [168].

Circuit Judge Walter E. Cummings pointed out some of the parallels between the case at bar and *Simpson* in his dissenting opinion [224]:

> "A close study of the *Simpson* case, including the briefs filed therein, convinces me that the Supreme Court would not accept the *in pari delicto* defense here. As with these plaintiffs, Simpson had freedom of choice 'to accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts.' He 'deliberately and knowingly enter[ed] into [the] contractual obligations' (311 F.2d 764, 768, 769). In *Simpson*, the Ninth Circuit used the *in pari delicto* theory to deny him any recovery. That point was fully briefed in the Supreme Court which reversed, permitting Simpson to prevail. Therefore, I am forced to conclude that the Supreme Court rejected the *in pari delicto* defense. Judge McLean came to the same conclusion in Lyons v. Westinghouse Electric Corporation, 235 F.Supp. 526, 537 (S.D. N.Y. 1964), stating:
>
> > "'It may be noted that under Simpson v. Union Oil Co., supra, the fact that plaintiffs voluntarily entered into an illegal contract does not in itself bar their recovery. The contract, if illegal, is still an actionable wrong.'
>
> "In *Simpson*, even Mr. Justice Stewart's dissent agreed that the *in pari delicto* reasoning of the Ninth Circuit was 'untenable' (377 U.S. at p. 25). As in Simpson, these defendants had the coercive power to terminate plaintiffs' franchises if plaintiffs did not adhere to the resale price maintenance and exclusive dealing provisions. These plaintiffs wished to buy various parts (tailpipes, clamps, etc.) from competitors of Midas, who were selling at lower prices than Midas. If they had been permitted to purchase at these lower prices, they would have been able to lower their price, as did Simpson."

Sound administration of the antitrust laws demands that the views expressed by Circuit Judge Cummings in his dis-

senting opinion prevail. In effect the majority opinion permits Respondents to use a franchise agreement which they have drafted and for which they are solely responsible to insulate themselves from liability for their subsequent acts requiring Petitioners to adhere to the exclusive dealing, tying and price-fixing provisions in those franchises. Under the majority theory, Respondents' franchise document constitutes a privately created exemption from the provisions of Section 4 of the Clayton Act through which franchisors, with complete immunity from franchisee suits under the provisions of Section 4, may require exclusive dealing, fix prices, and effect other unlawful restraints without regard to the public policy legislatively defined in the Sherman and Clayton Acts. The decision of the Court below not only allows Respondents to deny their competitors free access to a market for their products, but goes far beyond this and permits Respondents also to interfere with a purchaser's right to sell to whom he pleases, at prices of his own choosing. But see *United States v. Arnold, Schwinn, & Co.* ___ U.S. ___, 87 S.Ct. 1856 (1967). Section 4 cannot be read to allow this result.

The Court below ignored the fact that Respondents had no right to impose exclusive dealing and price-fixing requirements as part of their franchise agreements, *Goodyear Tire and Rubber Co. v. F.T.C.*, 331 F.2d 394, 401 (C.A. 7, 1964), affirmed 381 U.S. 357, 85 S.Ct. 1498 (1965); the fact that the Respondents' franchise agreements were illegal even if they were not coercively induced, *Sun Oil Company v. F.T.C.*, 350 F.2d 624, 636 (C.A. 7, 1965), cert. denied 382 U.S. 982, 86 S.Ct. 559 (1966); as well as the fact that Petitioners accepted the Respondents' franchise agreement as the only basis on which Respondents would do business with them and not in any effort to establish, assist, or cooperate with the Respondents in violating the antitrust laws. See, e.g., *Bales v. Kansas City Star*, 336 F.2d 439 (C.A. 8, 1964); *Red Rock Bottlers v. Red Rock Cola Company*, CCH Trade Cases 1953 ¶ 67,375 (D. Ga., 1952).

The Court below also failed to attach any legal significance to the fact that Respondents used threats of franchise termination under the 30-day cancellation provisions in their franchise agreement (and actual termination where threats proved ineffective)[30] to compel Petitioners and other franchisees to observe the unlawful provisions in their franchise agreement. See *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960); *Osborn v. Sinclair Refining Co.*, 324 F.2d 566 (C.A. 4, 1963); and *Goodyear Tire and Rubber Company v. F.T.C.*, supra, at 401. The Court below even ignored the record which showed that Respondents [195-196] had "studied" each and every MIDAS order as it was processed for shipment to "isolate" those dealers who were not buying tailpipes from them, as well as the fact that Respondents distributed the results of this "study" to their field counselors with instructions to "enforce" the exclusive dealing provisions in the franchise agreement. The record shows that Respondents' field counselors carried out their instructions. One such salesman wrote [193] to Petitioner Ross that it was "MIDAS Policy" that Ross buy "exclusively from MIDAS." He told Ross that he would "get into the matter more fully" on his next visit. The same salesman later complained to Ross [194] that Gordon Sherman [President of MIDAS] advised him that Ross was "not purchasing clamps from MIDAS" stating that he had to "report" to Sherman on this matter. In the face of this overwhelming evidence of coercion the Court below held [214] that "coercion" could not be a factor herein since Petitioners had voluntarily "entered into" the franchise agreements in the first instance. In effect the Court below held that once a franchisee *enters into* an unlawful agreement "voluntarily," his franchisor may thereafter enforce the terms of that agreement without regard to the provisions of the antitrust laws. This construction of the antitrust laws is absurd.

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[30]The franchise of Petitioner Pierce was terminated in precisely this manner [133, 199, 200, 201].

The majority opinion of the Court below does not even accord Petitioners standing equal to the standing which this Court granted the plaintiff in *Moore v. Mead's Fine Bread*, 340 U.S. 944, 71 S.Ct. 528 (1951), vacating 184 F.2d 338 (C.A. 10, 1950). There was much more reason to apply the *in pari delicto* defense in *Moore* than there is to apply it here. There, however, this Court did not permit the defense, although defendant's violations were an attempt to protect itself against unlawful, predatory practices which plaintiff had initiated. Plaintiff was the direct and specific cause of his own damage in *Moore*. Nevertheless, in plaintiff's action for treble-damages under Section 4, the *in pari delicto* defense, though specifically asserted, was rejected.

The theory expounded by the majority opinion below virtually destroys Section 4 as a weapon for enforcement of Section 1 of the Sherman Act and Section 3 of the Clayton Act. Under that theory, franchisees are precluded from asserting their right to treble-damages by entering into a franchise agreement enforced in violation of those statutes. Such result was never intended.

In Section 4 Congress has provided injured parties with tools to compel compliance with the antitrust laws and achieve economic redress. Indeed, private suits under Section 4 play and were intended to play a vital role in promoting competition. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 869 (1955); see, e.g., *J. I. Case Co. v. Borak*, 377 U.S. 426, 432, 84 S.Ct. 1555, 1560 (1964). Such private enforcement is essential to the effective administration of the antitrust laws since neither the Department of Justice nor the Federal Trade Commission has the financial or administrative resources to sift out all violations and act upon them. Moreover, penalties which those agencies are permitted to seek may be far less effective since treble damages arising out of Sherman Act and Clayton Act violations can greatly exceed the criminal and civil penalties imposed in an action brought by the Government. The threat of a treble-damage action is a potent

deterrent to violations of the antitrust laws; it is in fact the most effective deterrent against such violations. See "Unclean Hands, The Effect of Antitrust Violations on Antitrust Actions," 113 Pa. L.Rev. 1071, 1080 (1965).

In *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751-752, 67 S.Ct. 1015 (1947), this Court explained the purpose of Section 4 as follows:

> ". . . This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. . . . It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorneys' fees."

In light of this Congressional policy, it is clear that the majority opinion below produces paradoxical results. It denies benefits of the antitrust laws to one of the very classes of persons that those laws were designed to protect, negates effective enforcement of the antitrust laws by the very persons who have the closest and perhaps the only personal knowledge of antitrust violations, and at the same time allows defendants to perpetuate practices which the Clayton and Sherman Acts were designed to stop. If Section 4 is to achieve its legislative purpose of amplifying enforcement of the antitrust laws, Federal Courts should not be permitted to overrride its strong public policy by developing a judicial "hostility" to treble-damage claims through the application of irrelevant common-law principles. Circuit Judge Cummings in his dissent below recognized the anomalous result. He stated [225]:

> "The public policy justifying the denial of an *in pari delicto* defense in a case of this sort was stated as

follows with reference to the unclean hands defense raised in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214:

> "'If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those injured.'"

The situation in the instant case is within this Court's holding in *Simpson v. Union Oil Co. of California*, supra; the doctrine of *in pari delicto* is inapplicable. See also *Koufakis v. Carvel* (67-C-1951, E.D.N.Y., January 5, 1968) and *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, 386 F.2d 757 (C.A. 6, 1967).

B. Violations of Section 3 of the Clayton Act.

The doctrine of *in pari delicto* has no application to actions brought under Section 4 of the Clayton Act for violations of Section 3 of the Clayton Act. Section 3 makes it unlawful:

> ". . . for any person engaged in commerce, in the course of such commerce, to . . . make a sale . . . of supplies, . . . for . . . resale . . ., or fix a price charged therefor, . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the . . . supplies, . . . of a competitor or competitors of the . . . seller, where the effect of such . . . sale . . . or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Petitioners are among the class of persons whom this statute was designed to protect. *Bales v. Kansas City Star*, supra. The provisions of this section are directed specifically to "sales" on the "condition, agreement or under-

standing . . ." that the "purchaser" shall not deal in the goods of competitors. It was designed to prevent sellers from imposing their will on purchasers. This statute does not prevent nor does it even attempt to condemn "purchases" on a "condition, agreement, or understanding . . ." In view of this it is rather difficult to understand how Petitioners are *in pari delicto*. They surely have done nothing to violate the provisions of this section of the Clayton Act.

The assertion that Petitioners are *in pari delicto* under Section 3 is rather anomalous. In order to sustain an action under this Section they must show a sale on the "condition, agreement, or understanding . . ." Without a "sale" on the "condition, agreement, or understanding . . ." there can be no violation of Section 3. See *McElhenney v. Western Auto Supply Co.*, 269 F.2d 332 (C.A. 4, 1959), and *Amplex v. Outboard Marine Corp.*, 380 F.2d 112 (C.A. 4, 1967). Having shown a "sale" on the "condition . . ." to satisfy the test of this section, i.e., a sale pursuant to the terms of the Respondents' franchise agreement on which Respondents' whole business concept is predicated, Petitioners are thrust onto the horns of a false dilemma: the consent essential to the very agreement and "sale" on the "condition . . ." which they must show to state a cause of action constitutes a bar to their recovery.

Neither *in pari delicto* nor consent has a place in private judicial enforcement of Section 3 of the Clayton Act. Section 3 is an anticonsent statute. See "In Pari Delicto And Consent As Defenses in Private Antitrust Suits," 78 Harv. L.Rev. 1241 (1965); "Limiting the Unclean Hands and In Pari Delicto Defenses in Antitrust Suits - An Additional Justification," 54 N.W. Law Rev. 456 (1959).[31]

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[31] ". . . several other district courts have displayed an apparent disregard to the recent Supreme Court and circuit court cases which limited the defense. To the extent that this misunderstanding is accountable for the judicial hesitancy and apparent inconsistency in application, it is earnestly submitted that the courts are doing no injustice to the traditional use of the clean hands requirement by relaxing it

This Court has said that a claim under Section 4 "need only be tested under the Sherman Act's prohibition on unreasonable restraints of trade, . . . and meet the requirement that petitioner has thereby suffered injury." *Radovich v. National Football League,* 352 U.S. 445, 453, 77 S.Ct. 390 (1957); *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207; 79 S.Ct. 705 (1959); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,* 364 U.S. 656, 81 S.Ct. 365 (1961); "Standing to Sue for Treble Damages under Section 4 of the Clayton Act," 64 Columbia L.Rev. 570, 587 (1964). To the same general effect see *Mandeville Island Farms v. American Crystal Sugar Co.,*[32] 334 U.S. 219, 68 S.Ct. 996 (1948):

> ". . . It is enough that these petitioners have suffered the injuries for which the statutory remedy is afforded. For the test of legality and immunity . . . in view of the statute's policy, . . . [is] whether the statute's policy has been violated in a manner to produce the general consequences it forbids . . . for particular individuals essential to the recovery of treble damages." (at 243)

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in appropriate circumstances. On the contrary, proper application demands a weighing of public policy behind enforcing free competition on the one hand, with the public policy of forbearing aid to a plaintiff guilty of unconscionable conduct on the other. However, where Congress has codified the former public policy into the antitrust laws and has reannounced this policy several times, little evidentiary examination or measurement of comparative degrees of illegality is necessary; the call of public policy here is so loud and clear that it must be given decisive weight." [54 N.W.U. Law Rev. 464, 1959]

[32] In *Mandeville,* supra, the District Court held that Mandeville could not recover because it had failed to satisfy the commerce test and because it had signed a contract forming part of the illegal arrangement of which it had complained. The Court of Appeals affirmed on the commerce issue alone. This Court reversed, thereby rejecting the *in pari delicto* defense that defendant had specifically pleaded.

III

PETITIONERS' CAUSE OF ACTION BASED UPON SECTION 1 OF THE SHERMAN ACT WAS DISMISSED IN ERROR

A. A Conspiracy Existed.

The record in the instant case raises an issue of fact as to the presence of a conspiracy between and among Respondents. Respondents' corporations together constituted a complex multi-corporate structure in which one or more separately incorporated subsidiaries held themselves out as competitors to one another. Respondent International, for example, sold its International brand muffler which was physically identical to the MIDAS Muffler (except for brand) to retailers who were in competition with Petitioners who purchased the MIDAS brand muffler from the Respondent MIDAS. Respondent MIDAS would not sell its MIDAS Muffler to retailers who purchased the International muffler, and International would not sell its muffler to the MIDAS franchisees. Then, under such circumstances Petitioners have for the purposes of summary judgment established a conspiracy within the meaning of Section 1 of the Sherman Act. See, e.g., *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F.Supp. 915 (D.C. Hawaii, 1967); *Nelson Radio and Supply Co. v. Motorola,* 200 F.2d 911, 914 (C.A. 5, 1952). In *Nelson Radio,* supra, the Court said:

> ". . . and, of course, a corporation and its subsidiaries can be guilty of a conspiracy in restraint of trade, but that involves separate corporate entities . . ." (at 914)

In the instant case a parent corporation controls separately incorporated subsidiary corporations. The subsidiary corporations and the parent corporation hold themselves out as competitors of one another. They sell merchandise to competitors of one another. Surely such corporations can conspire. Surely the officers of MIDAS have conspired with

the officers of International Parts Corporation and with each other when they jointly established a system of distribution which insulated their respective customers from one another through franchise agreements.

The conspiracy here is precisely the type of conspiracy which the Court condemned in *Kiefer-Stewart, Co.*, supra. In that treble-damage action under Section 1 of the Sherman Act, the defendants Seagram and Calvert were affiliated companies. Defendants argued, as Respondents here have argued, that they were a single business entity. The court rejected this argument:

> "Respondents next suggest that their status as 'mere instrumentalities of a single manufacturing merchandising unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. E.g. United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010. The rule is especially applicable where, as here, respondents hold themselves out as competitors." (at 261)

Circuit Judge Cummings in his dissenting opinion below recognized the applicability of the language quoted above from *Kiefer-Stewart*, supra. Judge Cummings stated [226]:

> "With respect to the majority's alternative basis . . ., this record shows that MIDAS and International held themselves out as separate and 'divorced'. Therefore Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, does not permit defendants to claim that as a single business entity they were unable to conspire."

B. The Sherman Act Condemns Contracts in Restraint of Trade. Conspiracy Is Not Essential to a Claim Under Section 1 of the Sherman Act.

Assuming, *arguendo,* that the facts in the record disclose no conspiracy, this itself does not warrant the issuance of summary judgment in favor of Respondents. The impact of Section 1 of the Sherman Act is not limited to conspiracies. Section 1 is written in the disjunctive and condemns contracts *or* combinations in the form of trusts or otherwise in restraint of trade as well as conspiracies. The facts in the record of the instant case clearly show an agreement in restraint of trade. Indeed, the record shows hundreds of such agreements between Respondents and their franchisees. These agreements are within the prescription of Section 1 of the Sherman Act as well as Section 3 of the Clayton Act. See, e.g., *Simpson v. Union Oil Co.,* supra; *Lessig v. Tidewater Oil Co.,* 327 F.2d 459 (C.A. 9, 1964).

Again, Circuit Judge Cummings recognized that [226]:

> "Under *Simpson v. Union Oil Co.,* 377 U.S. 13, and *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, a conspiracy is not needed to support Count I [alleging a violation of Section 1 of the Sherman Act]."

It was plain error for the Court below to ignore these agreements and dismiss Petitioners' Sherman Act count by simply asserting that Petitioners had not shown a conspiracy when proof of a conspiracy was not essential to Petitioners' claim.

IV

PETITIONERS' RIGHT TO A DECISION ON THE MERITS WAS DENIED BY SUMMARY JUDGMENT EVEN THOUGH THE RECORD DISCLOSED DISPUTED ISSUES OF FACT.

The summary judgment of the District Court conflicts with the decisions of this Court which grant private antitrust plaintiffs the right to a decision on the merits: *Radovich v. National Football League,* supra; *Klor's v. Broadway-Hale,* supra; *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 82 S.Ct. 486 (1962); *Continental Ore Company v. Union Carbide Corporation,* 370 U.S. 690, 82 S.Ct. 1404 (1962); *Simpson v. Union Oil of California,* supra. It was erroneous for the Court below to affirm the summary judgment entered by the District Court.

The record shows that Petitioners and Respondents were and are ready for trial. Discovery by both Respondents and Petitioners has been completed. Moreover, the decision of the Court below will not eliminate the necessity for trial of this complex matter since the antitrust ramifications of Petitioners' claim for damages arising from Respondents' violations of the Robinson-Patman Acts were remanded for trial.

The Court below segmented Petitioners' antitrust claims as well as the record and refused to look at the full fabric of Respondents' unlawful system of distribution and Petitioners' claims based thereon. Having found as a "fact" that Petitioners "consented" to Respondents' franchise agreement, for example, the Court ignored the legal significance of Petitioners' evidence of coercion even though it held that subsequent coercion existed.[33] The fact that Petitioners signed

[33] The Court below said (unanimously) that the District Court's finding that Petitioners "'were free to purchase either product [i.e. Respondents' other muffler] but chose Midas' [was] erroneous." "The record," it said, "contains much evidence that there was a continuous effort on the part of Midas to enforce the exclusive dealer requirement." [219]

franchise agreements constitutes only one piece of evidence. The fact that Respondents coerced Petitioners into compliance with unlawful provisions in their franchise agreements is another. Indeed, it was not the Petitioners' entering into Respondents' franchise agreement but, rather, the Respondents' subsequent enforcement of the terms of that franchise agreement which constitutes the gist of the offense of which the Petitioners complain. The existence of legal coercion is something that should have been decided on the basis of all evidence, not simply the signing of the agreement. If all facts were taken into consideration on the coercion issue, it is entirely possible and even probable that a jury would reach the conclusion that *in pari delicto* did not apply. See *Goldlawr Inc. v. Shubert,* CCH Trade Cases 1967 ¶ 72,147 (E.D. Pa., 1967). The existence of this genuine issue of fact precluded summary judgment.

The record disclosed other genuine issues of major and material fact with respect to the existence of conspiracy as well as with respect to whether Petitioner Pierce's [133, 199, 200, 201] franchise was terminated on an "agreeable basis."

In view of these genuine issues of fact, the case was not ripe for summary judgment. The Court below should have reversed the District Court's decision.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully urge that the decision of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. 1:

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

SECTION 3 OF THE CLAYTON ACT, 15 U.S.C. 14:

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

SECTION 4 OF THE CLAYTON ACT, 15 U.S.C. 15:

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 731.

No. 733

In the Supreme Court of the United States

OCTOBER TERM, 1967

PERMA LIFE MUFFLERS, INC.; et. al.,
Petitioners,

vs.

INTERNATIONAL PARTS CORPORATION; et. al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS

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April 1968

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In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 733

PERMA LIFE MUFFLERS, INC.; et. al.,
Petitioners,

vs.

INTERNATIONAL PARTS CORPORATION; et. al,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS

RULE AND STATUTES INVOLVED

The pertinent portions of Rule 56 of the Federal Rules of Civil Procedure are set forth in Appendix A hereof. The other statutes involved are set forth in Appendix A to petitioners' brief.

QUESTIONS PRESENTED

1. Does the doctrine of *in pari delicto* constitute a defense in a private antitrust action for treble damages?

2. Did the court of appeals and the district court correctly apply the *in pari delicto* defense in dismissing two counts of an antitrust complaint under the particular circumstances of this case where the undisputed facts show that the plaintiffs voluntarily executed initial franchise agreements, helped to formulate the new Midas plan for merchandising automotive exhaust systems, fostered and participated fully in and benefited from the growth and development of the allegedly illegal and restrictive program, sought even more franchises, and finally terminated the agreements only when defendants' competitor offered them even larger exclusive territories?

3. Did the courts below correctly hold that there was no genuine issue as to the fact that the activities of the individual and corporate defendants here were those of a single integrated business entity so as to preclude any finding of a combination or conspiracy among them?

4. Did the courts below correctly sustain the use of summary judgment procedure to dismiss two of the three counts of an antitrust complaint?

STATEMENT OF THE CASE

1. The Pleadings, Discovery and Summary Judgment Motion

The thrice-amended complaint (A 6-45) was filed on October 19, 1960 by seven separate corporations and six individual proprietorships which were owned and operated by five individuals—Gregory Skarupa, Maxwell Ross, Joseph Pierce, Claude Wheeler, and Paul Morris. The present four plaintiffs[1], after being licensed under franchise agreements with defendants to use the trade name, trademarks and service marks identified as "Midas" and "Midas Muffler Shops", had operated twenty such shops throughout the nation. Named as defendants were International Parts Corporation, three of its subsidiary corporations, plus six individual officers or agents of the corporate defendants. These ten technically separate legal persons constituted the single trading entity by which Nathan Sherman and his son Gordon Sherman conducted their family-owned business (A 64-65).

The gravamen of plaintiffs' allegations was that the Midas Muffler Shops should have been operated in a manner different from that provided by the franchise agreements. Particularly, plaintiffs asserted that they should have been allowed to use the retail shops identified by the Midas trade and service marks to sell and install non-

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[1] Morris voluntarily dismissed his complaint in January 1962, so that "plaintiffs" or "petitioners" refer to the remaining four individuals. Throughout this brief A refers to the Appendix, R to the Record and PB to Petitioners' Brief. Emphasis within quotations is supplied unless otherwise noted.

Midas exhaust parts and a wide variety of "allied automotive products."[2]

Count One of the complaint alleged violations of Section 1 of the Sherman Act through horizontal conspiracies among "the defendants and other co-conspirators *unknown*" (A 17-18). The defendants, among other things, allegedly conspired and/or agreed and/or combined to establish the Midas franchise program, agreed as to who could become Midas dealers, determined the alleged illegal terms of the franchise agreement, and fixed the prices of the exhaust system parts sold by defendants.[3] Count Two alleged violations of Section 3 of the Clayton Act by virtue of the exclusive aspects of the merchandising system through which defendants sold Midas brand exhaust system parts (A 18). Count Three alleged violations of the Robinson-Patman Act and is not presently before the Court (A 18-19). Plaintiffs did not seek *reimbursement for losses by the action since each plaintiff enjoyed substantial profits* during his relationship with defendants; on the contrary, plaintiffs sought as "damages" *additional monies* which they contend they would have attained if the Midas Muffler Shops had been operated in the manner they deemed best.

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[2] "Automotive exhaust system" parts are essentially the muffler, the exhaust pipe, the tailpipe and clamps to hold them in place (A 8). "Allied automobile products" are defined in the complaint as including "springs, shock absorbers, windshields, batteries, oil filters, seat covers and convertible tops" (A 9).

[3] Petitioners' present theory of a "combination" in violation of Section 1 (PB 40) through "hundreds" of vertical contracts between defendants and the *known* franchisees including plaintiffs themselves, was not alleged.

Plaintiffs initiated the discovery procedures and by September 1961 had examined hundreds of defendants' documents and had completed the depositions of five individuals, which covered 1036 pages of testimony. No further discovery was initiated by plaintiffs after October 1962, at which time they served extensive interrogatories, answers to which were subsequently filed by defendants (R 288-309, 429-45, 1032-52).

In October 1961 defendants commenced their discovery. Each plaintiff purported to produce all documents relevant to the charges and 350,000 of these documents were inspected by defendants. By November 1962 defendants had completed extensive depositions of the four plaintiffs, totaling 1605 pages of testimony. Subsequently, defendants served general interrogatories on all plaintiffs and separate interrogatories on each plaintiff, answers to which were filed in December 1964 and February 1965 (R 446-556, 577-1031). On June 30, 1965 the district court ordered that all discovery be completed by August 6, 1965 (R 1053), and following defendants' motion in August 1965 to compel further interrogatory answers or to preclude the introduction of evidence, plaintiffs filed supplemental interrogatory answers and produced additional documents (R 1132-39).

Shortly after the pretrial conference of August 6, 1965, defendants filed a motion for summary judgment (A 61-63) supported by an affidavit of defendants' principal executives, Nathan and Gordon Sherman, (A 64-72) and by the plaintiffs' deposition testimony and exhibits and plaintiffs' interrogatory answers which record facts were summarized for convenience of the district court in a

separate "Appendix"[4] (A 73-105). As to Counts One and Two of the complaint, defendants, in the first instance, assumed for purposes of the summary judgment motion that the franchise arrangement was illegal but asserted that the undisputed material facts established that plaintiffs were active, complete and voluntary participators in conjunction with defendants in any alleged illegal arrangement and, as a matter of law, could not premise a right to recover treble damages on their own illegal conduct (A 61-62). Alternatively, as to the contractual allegations in Counts One and Two, defendants asserted that the franchise agreements and merchandising methods were reasonable and lawful (A 62). As to Count One, defendants also asserted that defendants were a "single trader" and as a matter of fact did not, and as a matter of law could not, conspire to violate the Sherman Act (A 62a). The final portion of the motion was concerned with the Robinson-Patman Act charges in Count Three (A 62a-63).

Plaintiffs filed no affidavit in response to defendants' motion but merely submitted an "Opposition to the Motion for Summary Judgment" (R 1234-1312), which document was not even included by petitioners in the Appendix to this Court. As noted by the district court (A 111, 112-13, 118, 120), this "Opposition" was an argument of counsel insufficient under Rule 56(e) (App. A, *infra*) to contradict any fact set forth in defendants' affidavit or appendix. On February 25, 1966 the district court granted summary judgment on Counts One and Two but on the

[4] Defendants' motion was premised not upon the "depositions of the parties" (PB 5, note 7), but upon the depositions and interrogatory answers of plaintiffs. Neither the Appendix nor the Sherman affidavit was ever challenged as to accuracy or authenticity by the plaintiffs below.

basis of plaintiffs' assertion that they were entitled to further discovery on Count Three, denied summary judgment on that Count without prejudice to the renewal of the motion after defendants further answered plaintiffs' interrogatories (A 108-15). Defendants answered such interrogatories (R 1417-21) and filed a renewed motion for summary judgment (R 1422-32) which was then granted as to Count Three (A 116-22).

Since petitioners have disregarded virtually all of the undisputed testimony in their recitation of the facts (PB 7-14), respondents have been compelled to now set forth the relevant and material record facts.

2. Midas History

Prior to the introduction of the Midas franchise plan by defendants in 1955, exhaust system parts were sold to consumers from innumerable retail outlets, such as garages, gas stations, and in particular by the dealer service departments of the giant automobile manufacturers. A muffler was merchandised like most other automotive replacement parts, was given no special attention, enjoyed no consumer brand consciousness, and required a labor charge for installation (A 65-66). Defendants hoped to change all this with the introduction of Midas as a nationally advertised trade name, backed by a nationwide chain of specialized exhaust system shops featuring a unique guarantee and free fifteen-minute installation. A network of independent franchised dealers—each owning a retail outlet identified by the various "Midas" trade names and service marks—would invite the public to an automotive shop specializing in exhaust system parts (A 66-67). The dingy surroundings of the typical auto repair shop were to be replaced by the Midas atmosphere of cleanliness,

comfort, and prompt, courteous service (A 69). The guarantee of a new Midas muffler free to replace any that wore out so long as the customer owned the car was to be honored in each shop no matter where the first muffler was purchased (A 68). Free fifteen-minute installation by the dealer would be made economically possible by cost savings resulting from direct purchase from International Parts by Midas dealers at the price heretofore available in the automotive industry only to jobbers or wholesalers (A 68).

From infancy Midas was dedicated to cooperation with its dealers; it sought their suggestions and relied on their experiences in and before the program to promote and foster Midas growth and development. Plaintiffs Ross, Pierce and Skarupa, customers for International Parts brands in former years, were three of the dealers who pioneered with Midas in evolving its concepts.[5] When Wheeler signed his first contract in August of 1956 as the last plaintiff to join, there were approximately 30 Midas shops in the entire country in addition to those operated by plaintiffs.

Success for this new merchandising concept, and for each Midas dealer, necessitated that the American motorist recognize the Midas name and have confidence that each dealer was an exhaust specialist who handled the same quality product, provided the same clean and comfortable surroundings, gave the same prompt and dependable service, and honored the same unique Midas guarantee (A 68-69). Over three and a half million dollars were spent

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[5] Speaking as of March 1959, Ross described himself and Wheeler as then "old-timers . . . we fellows *who had originated with the program* : . . had gone through all this stuff time and time and time again" (Ross Dep. 293).

by defendants on national advertising to publicize this Midas story through all media: television, radio, billboards, newspapers and magazines. Individual Midas dealers, particularly these plaintiffs, coordinated local advertising using the Midas name and symbols with defendants' national program (A 69).[6]

Emphasizing the cooperative nature of this undertaking, a national association of Midas dealers held national and regional meetings, and a monthly magazine, the "Dealer Dabbler," advised each dealer of experiences of his distant fellow dealers and the development of the national Midas image (A 71). All of the plaintiffs attended the first national meeting of all dealers which was held in Chicago in March 1957 (Ross Dep. 284, Pierce Dep. 91, Skarupa Dep. 148, Wheeler Dep. 78-79).[7] As Midas grew, a National Advisory Council of ten select dealers was appointed to represent all dealers. This group, including Ross, Skarupa and Pierce as initial members, was made up of those dealers most active and interested in the Midas image and who had attained the greatest success. The Council met first in Asheville, North Carolina in October 1957 (Ross Dep. 284-87, Pierce Dep. 165, Skarupa Dep. 166) and met periodically thereafter to discuss with each other and the defendants ways and means of improving the whole Midas program (A 71). Regional meetings of dealers on at least an annual basis occurred during 1958-1960, many of which were attended by these plaintiffs (Ross Dep. 291, Pierce Dep. 166-67, Skarupa Dep. 164, Wheeler Dep. 138).

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[6] See Argument, *infra,* note 25, p. 61 and the Appendix (A 49-53) for samples of such advertising.

[7] Complete deposition testimony of all plaintiffs' and defendants' witnesses is separately included in the record filed here, but the pages were not given record numbers so that references throughout are to the actual pages of the deposition.

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Plaintiff Ross described generally the function of these meetings and the National Advisory Council:

> "As I understand it, *the function of this National Advisory Council was* to meet upon suggestions from headquarters in Chicago at their expense to discuss all phases of the operation. It was a discussion of ideas, *an exchange of ideas,* covering all phases of the operation, whether it was installation techniques or advertising methods and ideas of selling techniques, *anything* of a general nature *that would promote and help the program for the benefit of everybody in the program.*
>
> "By 'program' I mean—call it an organization; call it a society; call it on affiliation. I don't know what you care to call it. *It was a group of people with a common purpose in mind.* (Ross Dep. 284-85)
>
> * * *
>
> . . . the next actual meeting at which we confronted ourselves in person, I believe, was at Asheville, North Carolina, I believe, in October of 1957.
>
> Q. Do you recall any discussions as to Midas policy at that meeting?
>
> A. May I say for the record that *these were very comprehensive discussions.* They went on from morning to night. When I got through I was washed up. I don't remember specifically anything particular. We may have covered every topic we are discussing here this afternoon, but specifically what was discussed or what topic was discussed or what was said, I don't remember." (Ross Dep. 287)

In his own words, Ross thus made it clear that all the dealers contributed ideas and policies which became part of the Midas concept, that the "program" meant plaintiffs and defendants working together, and that policy decisions were not made by defendants alone. Ross also claimed credit individually for instituting several aspects

of the Midas program including the whole idea of a field counselor, "a traveling mindpicker . . . who would visit in the various shops to see what was done here that could be improved in the other shops. . . ." (Ross Dep. 287-288, 290), the method by which market penetration could be ascertained (*Ibid* 282-83), placing the Midas operator's name and address on the guarantee form (*Ibid* 288-89), and the adoption of "accounting policy and procedures, especially insofar as multiple shop operations were concerned" (*Ibid* 289).

At these meetings of dealers and the National Advisory Council the participants discussed and voted upon policies concerning the alleged illegal restrictions with respect to resale price maintenance (*Ibid* 296-97), wholesale sales (*Ibid* 290), and the sale of shocks and springs or other similar items (*Ibid* 294-95). For example, on one occasion "it was the consensus of the National Advisory Council at that meeting that wholesaling should be discontinued" (*Ibid* 290). Revision of the franchise, particularly with respect to territory, was also discussed (*Ibid* 297).

One important policy question decided by the dealers in the early days of the program was the role of the guarantee which also involved fixing the entire burden of its administration on International Parts. At the March 1957 national meeting most dealers eagerly requested defendants to make the guarantee a keystone of the Midas concept, but Mr. Pierce doubted its desirability; he thought he could sell as many mufflers without the guarantee as with it:

> "To me, it was ridiculous and I voiced my opinion at the first meeting when they applied the hundred

percent guarantee to the Midas franchise, and I told them at that time, . . . 'I consider the guarantee [covers only] factory defects and workmanship and material.'

"So then, the thing started to snowball and *the* [new Midas] *dealers got into it,* and they interpreted the guarantee different than we did. They said it was a hundred percent unconditional guarantee. I argued the point with them, [but] the dealers, the majority of the dealers felt it was a hundred percent guarantee, *so Midas decided to go along* on a hundred percent basis, but it was questionable at the time.

Q. This was in March '57?

A. The first meeting, and I think the dealers forced the issue on that point. I don't think they ever intended to start a 100 percent guarantee. In my estimation, it was a mistake, but the *dealers did force that issue.*" (Pierce Dep. 175-77).

As part of the program, a franchise agreement licensing the use of the trademark "Midas" and the service mark "Midas Muffler Shop" was tendered to each prospective dealer. Although four forms of contract are involved here, none of them required a franchise fee or purchase of capital equipment from defendants, and all were cancellable by either party on thirty days' notice (A 70). Since no prototype building or lease of real estate or other equipment from Midas was necessary, the use of the premises was unrestricted upon termination or cancellation (A 70).

From nothing in early 1955, Midas grew to 120 shops by 1957 and to 268 at the time plaintiffs terminated their franchises in 1959 (A 71-72). Midas brand sales were estimated at $4 million in 1957, $6 million for 1958, and

$8 million for 1959 (Jacob Dep. 170).[8] After obtaining their first Midas franchise agreement most dealers, including plaintiffs, subsequently opened additional shops. In partnership with Midas, the plaintiffs, individually and collectively, shared in increased sales in each succeeding year during their participation in the Midas program:

	1956	1957	1958	1959
Skarupa (R. 493)	$ 61,965	$ 210,484	$ 384,239	$ 488,468
Ross (R. 912)	90,245*	284,198*	289,659*	334,171
Pierce (R. 694)	357,253	507,657	592,400	685,870
Wheeler (R. 825)	8,510	180,445	253,949	265,914
Total	$517,973	$1,119,464	$1,494,903	$1,774,423
Midas Sales	Unavailable	4,000,000	6,000,000	8,000,000

* $94,996 of Ross' sales in Minneapolis from 1956 to 1958 have been allocated to these years on the basis of $3,000 per month per location since Ross professed an inability to identify such sales other than in toto.

3. Plaintiffs' Participation in the Midas Program

Plaintiffs' wholehearted and complete involvement in the Midas program was described at length in their deposition testimony and chronologically summarized in defendants' trial court Appendix (A 73-105).

The four plaintiffs' participation was remarkably similar. Each sought out defendants and voluntarily executed an initial franchise agreement, and each subsequently

[8] Total International Parts sales of all brands and all products including Midas were approximately $5 million in 1955, $7 million in 1956, $11 million in 1957, $13.5 million in 1958, and $17 million in 1959 (Defendants' response to plaintiffs' subpoena *duces tecum* March 5, 1961).

requested and executed additional franchises. As pioneers in the program each was a member of the National Advisory Council and contributed his ideas and thoughts to the evolution of the Midas merchandising concept in its formative years. Each of their twenty shops bore the name "Midas Muffler Shop" and displayed Midas advertising material. Each of their local advertising featured the Midas name and the Midas program—the specialist in mufflers, free installation, and the unique guarantee.

Each plaintiff started with a nominal capital investment, yet reaped enormous profits. When offered what they thought was an opportunity for greater profits with a competitive franchise, three of the four unilaterally *abandoned* the Midas program, and entered a similar program offered by an International Parts competitor under the brand name "Robin Hood."[9] Each assigned as a specific reason for his dissatisfaction with Midas the fact that Midas would not shield him from competition by granting him an "exclusive franchise" for larger areas in which he wanted to do business.

(a) Gregory Skarupa:

While a full time government employee with no prior business experience, Skarupa, through a brother-in-law, sought defendants' guidance in late 1955 in opening an In-

[9] Maremont Corporation sponsored "Robin Hood." Its national sales manager was an ex-Midas field counselor who had known the plaintiffs in the early Midas days and later solicited each of them on behalf of Robin Hood. It sought to emulate the Midas program, but its dealers sold items other than exhaust systems and there was no manufacturer's guarantee on the featured muffler. Plaintiffs uniformly suffered losses in this venture (A. 81-82, 89-90, 97, 101-104).

ternational muffler shop in the Washington, D.C., area (A 76-78, 146). His first Midas franchise agreement for Wheaton, Maryland was signed in March 1956 because "I *was interested* in the Midas program *provided* I *got* assurances from him that the *Washington metropolitan* area would be assigned to me *so that* if I developed it *I could reap the benefits of such development*" (A 77, 147). Having profited from the program and participated in it completely, (A 79-80) Skarupa executed three more Midas franchise agreements in December 1956, in May 1957, and in July 1958 (A 78-79).

Skarupa's principal complaint was that he was limited in his further expansion in the Midas program (A 80-81). He terminated his four franchises because he couldn't obtain franchises for three more Midas shops he wanted to open (A 148) and for which denial he is now seeking damages (A 155). Not satisfied with an offer of one more Midas shop, he wanted to monopolize and profit from every possible Midas Shop in the Washington, D. C. area. He obtained this exclusive territory when he unilaterally terminated his Midas franchise with defendants in 1959, and immediately joined the Robin Hood program (A 81-82). Ironically, defendants' concurrence in Skarupa's plan would have supplied the basis, according to plaintiffs' present legal position, for Skarupa now to claim more substantial antitrust damages, since his profitable operation of seven Midas Shops would have resulted in even greater financial "injury" than his profitable operation of four Midas Shops.

Plaintiff Skarupa, in four years as a Midas dealer and on a minimal investment of $9,800, enjoyed a mercurial rise from a $7,700 a year government clerk to $80,000 in one

year as a proprietor of four Midas shops (A 83). After a profit of over $200,000 from his four years' participation in the Midas conspiracy, Skarupa now seeks an additional $800,000 profit as "damages" (A 83-84), plus $20,000 per year for each store he didn't open (A 155).

(b) Maxwell Ross:

Ross, proprietor of a Muskegon, Michigan wrecking yard, wanted the Midas image—the guarantee, the advertising and the quick service (A 85). "*I thought that this* [*Midas*] *was a good idea.* I thought that it was *a way of making some real money* if you got into it *quickly . . .* The thing that *excited me was the guarantee, . . .*" (A 138). The franchise, now claimed to be illegal, was then viewed as "*an avenue for sales and profit for me.*" (A 137). Merchandising exhaust parts by national advertising as originated by Midas was a "novel and new" concept which had a "tremendous" impact (Ross Dep. 281) and which gave his business "more substance, more credibility" (Ross Dep. 313).

The first plaintiff to join Midas, he executed his first franchise for Muskegon, Michigan in December 1955; another for Grand Rapids followed in May 1956. After "a good measure of success in the Muskegon and Grand Rapids areas," he opened two shops in Minneapolis. "I liked the program. It was making money for me. I wanted to get into a larger metropolitan area, and Minneapolis was open." "*I wanted not only the Minneapolis* [*area*] *but* [*alsa*] St. Paul." (A 135).

When Minnesota proved too much for him, he came back to Michigan and signed new franchises for Kalamazoo (April 1958) and Battle Creek (May 1959). Defendants'

discouragement of his opening still another shop in Grand Rapids was one of his assigned reasons for cancelling Midas (Ross Dep. 172-76), which he did by letters of November 13, 1959 (A 168-69) after Robin Hood, with whom he had been discussing franchises for several months, gave him all of Michigan as his exclusive territory (A 89).

Disappointed in his failure in Robin Hood after four successful years with Midas, Ross now seeks to recover from Midas over $488,000 in alleged "damages" in addition to $150,000 in Midas profits (A 91).

(c) Joseph Pierce:

Plaintiff Pierce was the operator of three muffler shops in upstate New York which featured International Parts products and had been established in 1954-55 with the assistance of defendants prior to the development of the Midas program (A 92-93).

Midas was first considered by Pierce in March 1956 when he and an International Parts representative visited a Midas Muffler shop in Buffalo and discussed the Midas program with the shop owner (A 93). Pierce was informed that Midas Shops were to be opened in upstate New York and that existing purchasers from International Parts were to be given the first opportunity to obtain the new franchises. "So as not to invite competition," (A 125) from any new Midas dealers, Pierce signed his first Midas franchise agreements on April 1, 1956, for the three existing Pierce Muffler Shops in Binghampton, Syracuse and Utica (A 94). But, contrary to the implications of Petitioners' Brief (p. 7) Pierce was not then cut off from International brand auto exhaust systems; he continued to buy and sell

them for his retail stores throughout his association with Midas (A 131).[10]

Pierce immediately began searching for additional locations for Midas Shops and in the course of his search helped convince a friend to become a Midas dealer in Albany, one of the locations at which he looked:

> ". . . . I explained the program to him. I told him I was enthused about it and he seemed to like it, so eventually, he became a Midas dealer." (A 128).

He also accompanied a friend to Chicago who inquired about a possible Midas franchise (A 94).

Pierce did find other locations; by June 1956, he had opened his fourth Midas Shop, a second shop in Syracuse, and by May 1957 he had obtained locations in Rome and Elmira and signed Midas franchise agreements for these two shops. Without even asking defendants for another Midas franchise agreement, Pierce renewed his expansion in 1958 and opened his seventh Midas Shop, in Mattydale, a suburb of Syracuse (A 94).

Pierce was dissatisfied with the change in the guarantee from a 100% charge against Midas to a 50% split with the

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[10] "Q. During the time that you were in the Midas program, did you continue to sell International brand mufflers and other items through your retail locations?

A. Yes, sir, to some extent.

* * * * *

A. The question is whether our sales at the retail stores were about the same as they were —

Q. For International brand?

A. Yes, approximately; probably would be a little bit less on account of the muffler competition that was coming in at that time."

(Pierce Dep. 47-48).

dealers,[11] and in February 1959 wrote defendants and threatened to exercise his option to terminate his Midas franchises (A 171). Suggestions of termination and sale of another exhaust system brand were subsequently repeated by Pierce (A 95). In June 1959, he did terminate the franchise at Elmira and began to sell a competitive brand muffler from his other Midas Shops (Pierce Dep. 98-99) and to advertise non-Midas products under the Midas name (A 51-52). He admitted selling Texas brand tailpipes and Nu-Era brand mufflers at "all [his] your locations" and that the consumer might have been deceived as to even the brand of muffler Pierce sold him or what guarantee he was obtaining.[12]

After Pierce had reduced the high unpaid balance on his account, which had existed since his threat of cancellation, defendants accelerated Pierce's proposed cancellation by exercising their contractual right to terminate (A 96-97). Pierce made no effort to reinstate the franchises. In fact he offered willingly "to cooperate fully with your request to terminate the Midas franchises we hold" (A 172). He continued to do business at the same locations purchasing "Arrow" brand mufflers from Maremont on the condition that no Robin Hood competition would be established in his territory (A 97).

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[11] Pierce's initial reservations about the guarantee is described, *supra*, pp. 11-12; the background of the change in guarantee expense and its implications are discussed, *infra*, pp. 64-66.

[12] Q. Would you issue a guarantee on a Nu-Era muffler?

A. Our own guarantee.

Q. How did that differ from the Midas guarantee?

A. It didn't differ.

Q. Did the customer know whether he was getting your guarantee or the Midas guarantee?

A. I can't be sure of that, no. (Pierce Dep. 153-54)

Pierce benefited to the extent of at least $180,000 from his four years with Midas but now seeks "damages" exceeding one million dollars (A 97-98).

(d) Claude Wheeler:

A Life magazine advertisement seeking new Midas dealers which plaintiff Wheeler saw in 1956 changed his financial position, in three years, from a $6,000 a year pool room proprietor to $34,000 in one year as a proprietor of three Midas Muffler Shops in the St. Louis area (A 98-100). Wheeler "answered the ad" (A 156), and defendants thereafter assisted him in starting his business by arranging for his education in an existing Midas Muffler Shop and in helping him find a suitable location in St. Louis (A 99-101). His first "Midas Muffler Shop" was opened in September 1956 (A 100).

Although fully aware of the franchise provisions and Midas merchandising methods, Wheeler immediately sought more shops, so that he could preclude prospective Midas dealers from entering the St. Louis area. New stores were opened in St. Louis in March 1957 and June 1959 and in East St. Louis, Illinois, in July 1957 (A 100-101).

Wheeler, who was the first plaintiff in the program to terminate his Midas franchises, weighed that decision for a year to determine whether defendants would give him exclusive rights in the St. Louis area or whether he should accept such rights from defendants' Robin Hood competitors (A 101-102). Following his notice of termination of the Midas franchises, two Midas field counselors met Wheeler in his St. Louis office and begged him to retract his letter and stay in the Midas program. Wheeler was adamant and a few days later Gordon Sherman came

to St. Louis in an effort to change his mind. Wheeler said he was willing to stay with Midas if Midas would cancel the new franchisee in St. Louis and if he were thereby given "an exclusive franchise". "I told him I also wanted a hundred percent guarantee arrangement" (A 102-03; Wheeler Dep. 179). When defendants would not agree to these conditions, Wheeler began operating out of his Midas locations under the Robin Hood name and with the addition of shocks, springs, brakes and other products and services (A 103).

Despite the sixfold increase in his annual earnings and over $100,000 in personal profits in three years with Midas, Wheeler now seeks an additional $439,544.06 as "damages" (A 104).

4. The Decisions Below

After both courts below completely reviewed the record, it was obvious to them that there were no genuine issues as to the facts material to the decision herein. As the trial court said:

> "They are . . . *in pari delicto* with defendants, and therefore unable to reap the harvest of their own misdeeds. . . . They are not now entitled to the high profit of a treble damage suit when they voluntarily acceded to, fostered, and profited from the very practice about which they now complain." (A 109).

The court further found that:

> "[T]here has been no showing whatsoever of coercion, economic or otherwise. The depositions of the individual plaintiffs . . . uncontroverted except by counsel's arguments, reveal that each plaintiff signed franchise agreements freely and voluntarily 'as a way of making some real money' (Ross, Dep. pp. 238-40). . . . *It is*

> further *undisputed* from the record before us *that each plaintiff sought to expand his market area* after initially gaining a franchise, *sought to obtain additional franchises* thereafter, and *sought to create a monopoly for themselves* and defendants within specified territorial limits. Further, each plaintiff retained ownership or control of the premises at which his muffler shop was located, paid no franchise fee to defendants, and was able to terminate the agreement unilaterally on thirty days' notice. Under no circumstances could 'coercion' be said to have been a factor herein" (A 110).

With respect to the contention that the defense of *in pari delicto* was no longer available in antitrust cases as a result of *Kiefer-Stewart,* 340 U.S. 211 (1951) and *Moore* v. *Mead Service Co.,* 340 U.S. 944 (1951), the district court pointed out that the violation here was alleged to have taken place "*in conjunction* with defendant" and that defendants were not relying on a separate violation of law by the plaintiffs or the defense of unclean hands. In conclusion the court stated:

> "We are thus satisfied on the papers presented to us that no genuine factual controversy exists, and that defendant is entitled to summary judgment . . . on Counts I and II." (A 111).

As an alternative ground for dismissal of the conspiracy allegations in Counts I and II, the court pointed out that under the undisputed facts "the corporate and individual defendants were a single business entity through which a family business was operated, and that, therefore, as a matter of law, no conspiracy existed among them in violation of Section 1 of the Sherman Act." (A 111). He pointed out that the individual defendants acted only as corporate agents in their normal employment capacities,

and that there was no evidence "except in plaintiffs unsupported arguments that these corporations competed with each other or acted in any manner other than as a single integrated business. . . . Plaintiffs may not by mere pleading allegations and conclusions fragmentize a unified business to meet the conspiracy requirements of the Sherman Act" (A 112-13).

In affirming, the court of appeals (one judge dissenting) pointed out that:

> "The deposition testimony of each of the plaintiffs is highly significant and, standing alone, completely refutes any notion that their participation in the Midas program was other than on a voluntary basis, or that they were coerced in pursuing a course which they now claim was illegal and for which damages are sought." (A 209.)

The opinion sets forth in considerable detail excerpts from those depositions (A 209-11) and distinguishes this court's decision in *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), on the grounds that this Court did "not mention *pari delicto* and we think it did not intend to annihilate a principle so long imbedded in the law" (A 212). The court also pointed out that the facts of this case "are a far cry from those considered by the Supreme Court in *Simpson*" (A 212) and then concluded:

> "In resume, each plaintiff initially asked to become a participant in the Midas merchandising program . . . Each plaintiff thereafter eagerly sought additional shops . . . Each plaintiff at all times had the legal right to abandon the Midas program . . . Three of the instant plaintiffs unilaterally terminated their franchises when it suited their convenience and the fourth acquiesced in the termination of his franchise. Furthermore, each plaintiff cooperated with defendants and all other Midas dealers in the conduct which plaintiffs now

assert was illegal and injurious to their business and property. Each plaintiff accepted the benefits arising out of the franchise agreements and earned substantial and significant profits during the terms of such agreements. Each plaintiff sought to perpetuate the 'wrong' of which he now complains by acquiring additional franchises, . . .

"It would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine. We hold that it was properly applied and given effect by the District Court." (A 214-15)

With respect to the alternative grounds for dismissal of the conspiracy allegations, the court of appeals stated its agreement with the reasoning of the district court quoted above (A 215).

SUMMARY OF ARGUMENT

I. The undisputed facts showed that each of the four plaintiffs voluntarily joined with defendants in the initiation of the Midas franchise program now claimed to be illegal under the antitrust laws, and that each of them participated in, helped to develop, and profited from that very same allegedly illegal system of distribution. The courts below correctly concluded that plaintiffs were *in pari delicto* with defendants and thus barred from recovering any alleged damages.

A. The doctrine of *in pari delicto* is firmly established in the law; it originated in the common law and has been consistently applied from earliest times by this Court and by the other federal courts in restraint of trade cases, both before and after the time when the Sherman Act provided a treble damage remedy.

B. No decision of this Court has purported to abolish the *in pari delicto* defense in antitrust cases. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) and *Moore* v. *Mead Service Co.*, 340 U.S. 944 (1951) overruled defenses of "unclean hands" on the basis of considerations entirely different from those involved in the *in pari delicto* doctrine. The defense is still applied on the proper facts in antitrust cases by the courts of appeal and the district courts.

Exceptions to the *in pari delicto* doctrine are recognized when the complaining party has been "coerced" so that he becomes a "victim" of, rather than a "participant" in, the alleged illegality; in such cases the restraints have been imposed solely for the benefit of the defendant. An exception is also recognized for those plaintiffs who have withdrawn from an alleged illegal plan or for those who seek only to restrain enforcement of the illegal agreement in the future.

Simpson v. *Union Oil Co.*, 377 U.S. 13 (1964) was decided solely on the basis of "consent" by the plaintiff to an antitrust violation. Legally and factually mere "consent" is not the same as *in pari delicto* where the complainant participates in and benefits from the illegal activity.

C. The *in pari delicto* doctrine clearly applies here. These plaintiffs collectively and individually embraced the new Midas franchise system of distribution—an image of specialization in the sale of exhaust parts under the trade and service marks "Midas" and "Midas Muffler Shop" by a nationwide network of shops supported by extensive national advertising and featuring free fifteen-minute installation and a unique guarantee. At plaintiffs'

request, exclusive territories for them were a part of that system and they benefited from the restrictions on resale and on price competition which were corollaries of their insistence on exclusivity within their areas. Each plaintiff participated in the formation and development of franchise policies through group discussions of all phases of the operations including the now objected to restrictions on resale prices, wholesale sales, and sale of shock absorbers and other allied automobile parts. Each advertised extensively along with defendants, extolling the advantages for the consuming public of all aspects of the specialized Midas program. Aware of the restrictions in the program, plaintiffs for three and a half years sought and obtained more and more Midas franchises. Each profited substantially from the program with its restrictions. Not until plaintiffs became dissatisfied with sharing with defendants the expense of replacing mufflers under the guarantee, and a Midas competitor offered them even larger exclusive territories, did the plaintiffs terminate their connection with the alleged illegal program. All elements of *in pari delicto* are thus present and the defense should be applied.

None of the exceptions to the doctrine is applicable. There is no coercion here. In *Simpson* and in other cases relied upon by the petitioners, the dealer plaintiff had no alternative but to deal with defendants if he wished to stay in business. The defendants there were giants in the industry involved who had unilaterally and against the dealers' expressed desires terminated the distribution arrangement between them. Here, the defendant was a relatively small company, and it was the plaintiffs who cancelled their contracts with the defendants and continued on in the same business at the same locations under a new trademark supplied by defendants' competitor.

Application of the *in pari delicto* doctrine here accords with the policy of the antitrust laws. It prevents wrongdoers from benefiting from the consequences of their own illegal acts when they have been injured, if at all, from such acts rather than from just the acts of the defendants. Allowing recovery here would encourage violations of the antitrust laws by providing an incentive to those who would profit from their own violations. Section 4 of the Clayton Act was designed to assist the injured, not to protect the joint venturer in an alleged illegal agreement or to permit a persistent participant to obtain the benefits of treble damages.

II. The issue of the reasonableness of the Midas contractual arrangements was not ruled upon by either court below since the *in pari delicto* defense applied even if the program were ruled illegal and for that same reason the merits of the arrangement are not in issue here.

A. Nevertheless, the franchise provisions were reasonable and necessary, as a matter of law, to assure the American motorist that he would find the products and services which the plaintiffs' advertising of "Midas" represented would be obtained at a "Midas Muffler Shop".

B. Defendants did not possess "sufficient economic power" to "appreciably restrain free competition in the market" and to the extent that plaintiffs were required to purchase from defendants all exhaust system parts sold in a "Midas Muffler Shop" (all of which were covered by the registered trade or service marks of the defendants), it was a reasonable method of doing business being used "by a small company in an attempt to break into the market." *White Motor Co.* v. *United States*, 372 U.S. 253, 262-63 (1963).

C. The change in allocating the expense of the returned mufflers under the Midas guarantee so that the dealer and the defendants shared such expense equally did not consti-

tute an antitrust or other violation of law. Plaintiffs' "reappraisal" of their part in the Midas program as a result of this change in January 1959 demonstrates conclusively their complete participation in, and acceptance of the benefits of, the alleged illegal program prior to that date.

D. To the extent that defendants' good faith and intent to obey the law may be relevant, the initial franchise agreements were not illegal *per se,* and their terms and conditions have been changed as the program grew and as the subsequent decisions of this Court construed the applicable law. The current franchise reflects such changes and is reasonable in all respects.

III. It is undisputed that the defendant corporations were owned and controlled by Nathan and Gordon Sherman, individual defendants, as the means by which they carried on their automobile parts business and that all of the individual defendants acted only in their normal employment capacities. Only one operating corporation precluded any holding out of defendants as competitors or as separate and divorced. Accordingly there was no conspiracy or combination or agreement or contract among the defendants in violation of Section 1 of the Sherman Act. The complaint contains no allegation of a "combination or contract" among the plaintiffs or other Midas franchisees and the defendants so that this issue, never raised in the trial court, is not before this Court.

IV. Since plaintiffs failed to contradict the defendants' Affidavit and the defendants' Appendix of plaintiffs' testimony in depositions and answers to interrogatories which had been presented to the district court in support of defendants' motion for summary judgment, there was no genuine issue as to any material fact. All the facts required for decision were before the district court and the complaint was properly dismissed.

ARGUMENT

I. COUNTS ONE AND TWO WERE PROPERLY DISMISSED ON GROUNDS OF IN PARI DELICTO

Counts One and Two of the Complaint alleged that the Midas franchise agreements created an illegal system of distribution in restraint of trade.[13] The motion for summary judgment on these two counts *assumed*, for purposes of the motion, that this system of distribution may have been illegal in the respects alleged. The undisputed facts in the record, however, uncontroverted by any affidavit of plaintiffs, showed, and both the district court and the court of appeals properly found, that each plaintiff had voluntarily joined with defendants in the initiation of this franchise program, and then participated in, fostered, and profited from that very same allegedly illegal system of distribution. Both courts correctly concluded that plaintiffs were therefore barred under the doctrine of *in pari delicto* from recovering any damages alleged to have been suffered by participation in such illegal practices.

The doctrine of *in pari delicto* is firmly embedded in the law, has been consistently applied by this Court and by the lower federal courts, on proper facts, in private antitrust actions as well as other types of actions, and is clearly applicable to the facts of this case.

A. Historical Bases of the Doctrine

The doctrine is based upon the Latin maxim, *"in pari delicto portior est conditio defendentis,"* which literally

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[13]As the court of appeals found, no claim was made by plaintiffs that any restriction was imposed other than those contained in the franchise agreement (A 207).

means, "In a case of equal fault the condition of the defendant is the better one." Black, Law Dictionary (4th ed.), p. 898. Lord Mansfield summed up the principle by stating:

> "If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." *Holman* v. *Johnson*, 1 Cowp. 341, 343 (Trinity Term 1775).

See also I Story, *Equity Jurisprudence* (4th ed.) §298, p. 317; Chitty, *Contracts* (1826) p. 579; Pomeroy, *Equity Jurisprudence* (4th ed.) §402 (1918).

The doctrine was given effect by this Court and by the lower federal courts from earliest times in varying contexts, where the defense of some type of illegality was interposed.[14] This Court recognized that:

> "The defense is allowed, not for the sake of the defendant, but of law itself. . . . It will not enforce what is forbidden . . . Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. . . . [T]he law will not lend its support to a claim founded upon its violation." *Coppell* v. *Hall*, 74 U.S. 542, 558-59 (1868).

In particular, *in pari delicto* was upheld where the claimed illegality was a restraint of trade or other viola-

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[14] *Hannay* v. *Eve*, 3 Cranch 242, 248 (1806); *Coppell* v. *Hall*, 74 U.S. 542, 558-59 (1868); *Randall* v. *Howard*, 67 U.S. 585, 588 (1862); *Tool Co.* v. *Norris*, 69 U.S. 45, 56 (1864); *Oscanyan* v. *Arms Co.*, 103 U.S. 261, 268 (1880); *Hanauer* v. *Doane*, 79 U.S. 342, 347-48 (1870); *Gibbs* v. *Baltimore Gas Co.*, 130 U.S. 396, 412 (1889); *McMullen* v. *Hoffman*, 174 U.S. 639, 654-59 (1899); *Weil* v. *Neary*, 278 U.S. 160, 173-74 (1929).

tion of the antitrust laws. These cases fall into two broad categories — those dealing with enforcement or rescission of contracts, and those involving actions for treble damages.

1. Contract Cases

In the contract cases, the doctrine has become so familiar that it hardly requires citation. Very early this Court refused to aid a plaintiff in enforcement of a contract which was in restraint of trade. *Gibbs* v. *Baltimore Gas Co.,* 130 U.S. 396, 406, 412 (1889); *McMullen* v. *Hoffman,* 174 U.S. 639 (1899). In the latter case, this Court explained its rationale:

> "The court refuses to enforce such a contract and it permits the defendant to set up its illegality, not out of any regard for the defendant . . . but only on account of the public interest . . . The more plainly parties understand that when they enter into [such contracts they are] . . . themselves outside the protection of the law . . . the less inclined will they be to enter into them. In that way the public secures the benefit of rigid adherence to the law." 174 U.S. at 669-70.

The defense was continuously recognized in subsequent cases, subject to the condition that the illegality must be directly related to the enforcement sought and not merely collateral thereto. *Connolly* v. *Union Sewer Pipe Co.,* 184 U.S. 540, 549 (1902); *Cincinnati Packet Co.* v. *Bay,* 200 U.S. 179, 184-85 (1906); *Continental Wall Paper Co.* v. *Voight & Sons Co.,* 212 U.S. 227, 257-65 (1909); *Wilder Mfg. Co.* v. *Corn Products Co.,* 236 U.S. 165, 172-75 (1915); *A. B. Small Co.* v. *Lamborn & Co.,* 267 U.S. 248, 252 (1925). The principle has been reiterated as recently as *Bruce's Juices, Inc.* v. *American Can Co.,* 330 U.S. 743, 754-56 (1947), and *Kelly* v. *Kosuga,* 358 U.S. 516, 518-19 (1959).

Harriman v. *Northern Securities Co.*, 197 U.S. 244 (1905) was a contract case involving an attempt by a participant in a violation of the antitrust laws to be relieved of the past consequences of his acts rather than an attempt to enforce the contract. Harriman and others had conveyed stock of Northern Pacific Railway to a holding company in a transaction ultimately found to violate the Sherman Act. Harriman thereafter sued to rescind the conveyance and recover the stock. Relief was denied on the ground of the:

> "settled rule that property delivered under an illegal contract cannot be recovered back by any party in pari delicto." 197 U.S. at 295.

The Court would not permit one who joined in an illegal scheme to later renege and get back his contributions to the scheme even though the defendant would have been stripped of its ill-gotten benefit and the court would not have been involved in enforcing an illegal bargain. The rationale of the decision was necessarily that the Court would not disturb the condition in which the parties found themselves where that condition had resulted from performance of illegal acts in which both had participated.

2. Treble Damage Cases

Finally, this Court and the lower federal courts have on similar reasoning applied the doctrine of *in pari delicto* to bar recovery in actions brought to recover treble damages under the antitrust laws.

The earliest such case was *Bishop* v. *American Preservers Co.*, 105 Fed. 845 (N.D. Ill. 1900). Plaintiff combined with others to form a trust of preserve businesses in violation of the Sherman Act. Later he claimed to have been damaged thereby and sued for treble damages. As one ground

for denial of relief, the court stated that "plaintiff was himself a party to the unlawful combination, and was injured by reason of his illegal connection therewith." 105 Fed. at 846.

At the time of the enactment of the Clayton Act in 1914, which extended the rights of private plaintiffs to include injunctive relief as well as the monetary damages which had been provided by the Sherman Act, both the *Bishop* case and *Harriman* v. *Northern Securities Co.*, 197 U.S. 244 (1905) had been decided.

In *Bluefields Steamship Co.* v. *United Fruit Co.*, 243 Fed. 1 (3d Cir. 1917), *dismissed on stipulation*, 248 U.S. 595 (1919), a majority of the stockholders of one company sold their stock to a competitor in order to eliminate competition between them, and certain contracts were entered into to implement this purpose. Subsequently, the first company sued for treble damages, claiming it would have been better off if it had continued to compete with the second company. Relief was denied. The court stated:

> "The plaintiff's claim was in effect that it did not reap all the profits which the combination should have yielded because of the manner in which the defendant exercised its control and conducted the plaintiff's business." 243 Fed. at 14.

And concluded:

> "If, upon evidence which we think abundantly sufficient, the jury found that *all* the stockholders of the Bluefields Company *joined in forming* the alleged unlawful combination and in placing their company in it; *acquiesced* for a long term of years *in the part* their company *played in that combination* and in the manner it played it or was caused to play it; *and accepted and enjoyed the profits* which sprang *from it*, we are of opinion that *the corporation* itself was bound

by their acts and *was precluded from asserting a right of action based upon them*" 243 Fed. at 18.[15]

Shortly thereafter, the Second Circuit decided *Eastman Kodak Co. v. Blackmore,* 277 Fed. 694 (2d Cir. 1921), a case which closely parallels the instant case. The plaintiff was a distributor of photographic products purchased from Kodak. Kodak's distribution system involved various restrictions, including resale price fixing, restrictions on sales of goods to persons other than approved dealers, and prohibitions against carrying competing products. The court found that "plaintiff agreed actively to participate in and took the advantages of defendant's restrictive sales system and of the contracts and agreements in furtherance thereof" 277 Fed. at 696, even though plaintiff from time to time had been suspended by Kodak for failure to comply with the restrictive conditions and had been in each instance reinstated only after promising to adhere to the conditions. After Kodak's distribution system was declared illegal in a government suit, the dealer sued for treble damages, claiming to have been injured by the restrictions. A jury verdict for the dealer was reversed and the complaint was ordered dismissed. The court held that plaintiff was "*in pari delicto*" and stated:

> "[P]laintiff acquiesced and actively participated in defendant's so-called restrictive sales system. . . . During this period he gained such advantages as accrued from the price-fixing system and from the exclusion of those dealers, who, unlike plaintiff, would not accede to this method of doing business.
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> "The proposition of plaintiff, in effect, is that, while he joined with defendant in the illegal method of do-

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[15] The same result was reached on similar facts in *Tilden* v. *Quaker Oats Co.,* 1 F.2d 160, 166 (7th Cir. 1924).

> ing business after 1908 *and took such advantages as sprang therefrom,* he may nevertheless recover damages caused, as he claims, during the period when he and defendant were both wrongdoers. With this proposition we are unable to agree. 277 Fed. at 697, 698.

In 1927, this Court recognized the existence of the *in pari delicto* doctrine in treble damage cases in *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, 377 (1927). A photographic dealer alleged that Kodak had fixed resale prices, prohibited carrying of competitive goods, and after attempting unsuccessfully to purchase plaintiff's business had refused to sell it any further goods at dealer discounts. The dealer sued for damages flowing from the termination, and obtained a verdict. The district court had instructed the jury that if the plaintiff:

> "had not merely bought goods from the defendant because of a business necessity, but, with a knowledge of the defendant's purpose to monopolize, had knowingly and willfully helped to build up the monopoly, it was *in pari delicto,* and hence could not recover any damages whatever on account of the defendant's refusal to continue to sell it goods." 273 U.S. at 377.

This Court approved these instructions although it affirmed the verdict for plaintiff.

In *Northwestern Oil Co.* v. *Socony Vacuum Oil Co.,* 138 F.2d 967 (7th Cir. 1943), *cert. denied,* 321 U.S. 792 (1944), plaintiff, a gasoline jobber, sought treble damages on account of a price-fixing conspiracy which had raised the price it paid for gasoline. The court of appeals held that denial of relief would have been justified on the basis of *in pari delicto* because the proof showed that plaintiff's officers had knowingly participated and cooperated in

formulating the plan and had instructed plaintiff's employees to cooperate in promoting the plan.

> "Having participated in this illegal undertaking, plaintiff may not recover; where parties stand in pari delicto, the law leaves them where it finds them." 138 F.2d at 971.

Likewise, several district courts followed *Blackmore* and applied the doctrine of *in pari delicto* to bar relief in treble damage cases, e.g., *Morny* v. *Western Union Telegraph Co.,* 40 F. Supp. 193, 200-201 (S.D. N.Y. 1940); *Mid-West Theatres Co.* v. *Cooperative Theatres,* 43 F. Supp. 216, 224 (E.D. Mich. 1941).

It can be seen that all the foregoing cases applying *in pari delicto* involve substantially the following fact pattern, which, as is shown later, is also present in the instant case:

> —The plaintiff and the defendant voluntarily entered into an agreement or arrangement in illegal restraint of trade hoping and expecting to benefit and profit thereby.
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> —The plaintiff thereafter fostered and participated in the arrangement and did in fact benefit and profit by operating under the agreement for a period of time.
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> —The plaintiff subsequently became disappointed with the benefit obtained, had a falling out with the defendant and concluded that he would have profited more if he had operated free of the restrictive agreement and thereupon brought a suit for treble damages based on the illegal arrangement.

There are at least three reasons which compel a refusal of damages under such circumstances:

1. Refusing relief tends to discourage the performance of such illegal acts,

2. It is abhorrent to a court to lend its aid to relieve a wrongdoer from the direct consequences of his own illegal acts or to permit him to reap the benefits of those acts and then later claim an additional bonus of treble damages, and

3. Any damage to the plaintiff from the illegal arrangement results as much from plaintiff's own participation as from defendant's participation therein; thus it cannot be said that the defendant's acts are the sole or proximate cause of plaintiff's damage.

B. Recent Development of the Law

1. Judicial Rejection of the "Unclean Hands" Defense Has Not Impaired the In Pari Delicto Defense in Antitrust Cases

Petitioners contend (P.B. 26-37) that a line of cases decided by this Court, starting with *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U.S. 211 (1951), and ending with *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), have abolished *in pari delicto* as a defense in private antitrust actions. The cases do not so hold.

Kiefer-Stewart Co. v. *Seagram & Sons,* 340 U.S. 211 (1951), was a suit by a liquor wholesaler who was cut off by Calvert and Seagram for failure to adhere to maximum resale prices. A jury verdict for plaintiff was reversed by the court of appeals on the ground that defendant had committed no illegal acts. This Court held the practice illegal and reversed and reinstated the verdict. The defendants sought to sustain the decision on a ground not passed on by the court of appeals, namely, that plaintiff had entered into a horizontal conspiracy with other wholesalers to fix minimum prices. This alleged conspiracy

among wholesalers to fix minimum prices was entirely separate from and unrelated to the price-fixing scheme among the distillers to fix maximum prices, and thus the defense was that of "unclean hands" rather than *in pari delicto.* This Court refused to allow this unclean hands defense.

There was good reason to do so. By granting relief, the Court was not lending its aid to relieve a wrongdoer of the direct consequences of his own illegal acts; the defendants' acts were plainly the proximate and sole cause of plaintiff's damage. In addition, the validity of the defense would have to be determined, in effect, by trying a separate lawsuit as to whether plaintiff was actually engaged in a violation unrelated to the subject matter of the litigation. See "Unclean Hands, the Effect of Antitrust Violations on Antitrust Actions," 113 U. of Pa. L.R. 1071; 1082 (1965).

None of these considerations would have applied had the plaintiff been *in pari delicto* with the defendants. This Court did not mention *in pari delicto* and in refusing the defense of unclean hands, it in no way purported to affect the established doctrine, nor would there have been any reason for it to do so.

The second case, *Moore* v. *Mead Service Co.,* 340 U.S. 944 (1951), also involved the defense of unclean hands. Plaintiff, a local baker, exacted a promise from substantially all his customers to buy only from him. Thereupon, a competing interstate bakery firm made a large price reduction in plaintiff's area while maintaining higher prices elsewhere. It is to be noted that even though defendant's illegal acts were committed *in retaliation* for plaintiff's illegal acts, the two schemes were separate and distinct; plaintiff was not a participant in and had not sought to

benefit from the price discrimination of which he complained. The court of appeals held plaintiff to be barred from recovery for the price discrimination, 184 F.2d 338 (10th Cir. 1950). This Court granted certiorari and summarily vacated the judgment per curiam with directions to reconsider the case in light of *Kiefer-Stewart*. Again, the decision had no effect on the law of *in pari delicto*.[16]

The obvious distinction between the defense of "unclean hands" and *in pari delicto* was clearly understood two years later in *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric, Light & Power Co.*, 209 F.2d 131 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954), as it was in the court below. In that case two utilities had entered into a contract in 1931 by which each had agreed to certain restrictions on its activities, and the parties had operated thereunder until 1948. In that year, Penn Water, which wished to make a prohibited extension of its plant, sought to repudiate the agreement and sued for a declaratory judgment that it was an illegal

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[16]Another case cited by petitioners, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948), (PB 37) decided prior to *Kiefer-Stewart*, did not deal at all with questions of *in pari delicto* or unclean hands. The court of appeals in a brief per curiam opinion confined its consideration to the single issue of interstate commerce and specifically disclaimed any consideration of or expression upon questions of *in pari delicto*, 159 F.2d 71, 72 (9th Cir. 1947). This Court likewise confined its consideration exclusively to the interstate commerce issue. In any event the plaintiff in that case, a sugar-beet grower, complained of a horizontal price-fixing agreement among his refiner customers by which he was compelled to enter into an unfavorable contract with one of the refiners. Assuming the latter contract to have been illegal, it was a different matter than the horizontal conspiracy of which he complained, and in any event it was clear that plaintiff was coerced into entering the contract by the illegal combination among the refiners.

restraint of trade. After two-and-a-half years of litigation, the contract was finally declared illegal and invalid. Penn Water then sued for damages it had suffered from the two-and-a-half year delay in being able to make the desired plant extension. Relief was denied and the Fourth Circuit affirmed on the ground that Penn Water was a party to the illegal agreement and therefore *in pari delicto*. Regarding the argument that the doctrine of *in pari delicto* had been overruled by *Kiefer-Stewart, Mandeville* and *Moore,* the court stated:

> "We do not so understand these decisions, for in none of them were the plaintiff and the defendant parties to the same illegal conspiracy or agreement on which the suit was based.
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> * * *
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> "We are satisfied that it was not the intention of the Supreme Court to overrule the doctrine firmly established in earlier cases" 209 F.2d at 133, 134.

No case decided by this Court has ever held otherwise. In fact, research has disclosed no subsequent case in which this Court has dealt with the doctrine of *in pari delicto*. The lower federal courts, however, have continued regularly to apply and define the doctrine.

For example, in *Lehmann Trading Corp.* v. *J & H Stolow, Inc.,* 184 F.Supp. 21, 22 (S.D.N.Y. 1960), the court denied a motion to strike the defense that "plaintiffs have participated to such an extent in the activities complained of and have so enjoyed the benefits thereof, and have themselves so violated the antitrust laws, as to be disentitled from maintaining any of the alleged rights of action set forth in the Complaint." The court distinguished sharply between cases where the plaintiffs participated beneficially in the very illegal acts complained of and cases where they

have merely engaged in other illegal acts, and held that in the former type of case, *in pari delicto* remains a defense.

The *in pari delicto* defense was similarly upheld and distinguished from the unclean hands defense in *H. & A. Selmer, Inc.* v. *Musical Instrument Exchange, Inc.*, 154 F. Supp. 697, 698-99 (S.D.N.Y. 1957) (alleged illegal franchise agreement). See also *New York Credit Men's Adj. Bureau* v. *Bruno-New York, Inc.*, 120 F. Supp. 495, 498 (S.D.N.Y. 1954). The defense was also applied in *Kershaw* v. *Kershaw Mfg. Co.*, 209 F.Supp. 447, 454 (M.D. Ala. 1962) *aff'd*, 327 F.2d 1002 (5th Cir. 1964) (contract for development of invention); *Louisiana Petroleum Retail Dealers, Inc.* v. *The Texas Company*, 148 F.Supp. 334, 337 (W.D. La. 1956) (price fixing); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896, 900 (7th Cir. 1966) (franchise agreements prohibiting purchase of competing products); see also *Florists' Nationwide Telephone Delivery Network* v. *Florists' Telegraph Delivery Association*, 371 F.2d 263, 267-68 (7th Cir. 1967), *cert. denied*, 387 U.S. 909 (1967) (group boycott).

At the same time, the lower courts, following *Kiefer-Stewart* and *Moore*, have properly refused to allow the defense of unclean hands. E.g., *Trebuhs Realty Co.* v. *News Syndicate Co.*, 107 F.Supp. 595, 597 (S.D.N.Y. 1952) (plaintiffs' alleged monopolization of play booking no defense to defendants' discrimination against plaintiffs in newspaper advertising rates); *Interborough News Co.* v. *Curtis Publishing Co.*, 108 F.Supp. 768, 770 (S.D.N.Y. 1952) (plaintiffs' alleged monopolization of wholesale distribution of magazines no defense to collective boycott of plaintiff by defendant publishers); and *Waldron* v. *British Petroleum Co.*, 231 F.Supp. 72, 92 (S.D.N.Y. 1964) (plaintiff's corrupt and illegal means used to obtain contract no

defense to defendant's antitrust violations injuring plaintiff's contractual rights). In the *Waldron* case, the court referred to cases such as *Penn Water* and *Lehmann Trading* and noted that the defense of *in pari delicto* remains available in such cases where the plaintiff is a party to the illegal acts complained of.

2. Exceptions to the In Pari Delicto Defense

The only situations in which the lower courts have found the defense inapplicable are those in which (a) the plaintiff's participation resulted from coercion, or to phrase it another way, he was a "victim" rather than a "participant", or (b) the plaintiff had completely and effectively withdrawn from the illegal arrangement and damages were claimed only for the period subsequent to such withdrawal, or (c) the plaintiff requested only injunctive relief against executory features of the agreement.

a. Coercion

The "coercion" class of case is exemplified by *Jewel Tea Co.* v. *Local Unions, etc.,* 274 F.2d 217, 223 (7th Cir.), *cert. denied,* 362 U.S. 936 (1960), where plaintiff had been compelled to agree to an illegal agreement with the labor unions to prevent the sale of meat after certain hours in the Chicago area under the threat of a costly strike. The defense was also recognized though not applied in *Allgair* v. *Glenmore Distilleries Co.,* 91 F. Supp. 93, 95 (S.D.N.Y. 1950), where a trial was required to determine whether plaintiff paid illegal brokerage under economic duress or compulsion and in *Ring* v. *Spina,* 148 F.2d 647, 653 (2d Cir. 1945), where the plaintiff was coerced into becoming a participant in an illegal restrictive scheme fostered by the Author's League of America and where the court said, "where the parties stand actually and truly *in pari delicto,* the law should leave them where it

finds them." Coercion may also arise from disparity in size and thus of bargaining power between the parties or from other circumstances where the plaintiff has no alternative but to deal with the defendant if he wants to be in business, *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 467-69 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *Bales* v. *Kansas City Star Co.*, 336 F.2d 439, 441-42 (8th Cir. 1964). See also *Gaines* v. *Carrollton Tobacco Board of Trade*, 386 F.2d 757, 759 (6th Cir. 1967).

Closely related to coercion is the notion of "victim" v. "participant". Where the plaintiffs enter the illegal arrangement not in the hope or expectation of gaining any benefit therefrom, or where the only discernible benefit flows exclusively to the defendant, some courts have characterized this situation by saying that the plaintiff is a "victim" rather than a "participant". Such cases include *Ring* v. *Spina*, 148 F.2d 647, 653 (2d Cir. 1945); *Enterprise Industries, Inc.* v. *Texas Co.*, 136 F.Supp. 420, 423 (D.Conn. 1955) *rev'd. on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) (plaintiff the victim of discriminatorily high prices); and *Red Rock Bottlers, Inc.* v. *Red Rock Cola Co.*, 1952 CCH Trade Cases ¶67,375 (N.D. Ga. 1952) (restrictive arrangement was for sole benefit of defendant and plaintiff gained no benefit therefrom).

b. Withdrawal or Purging

The lower courts have also found the *in pari delicto* defense inapplicable where the plaintiff had completely and effectively withdrawn from the illegal arrangement and damages were claimed only for the period after such withdrawal. This class of cases is exemplified by *Victor Talking Machine Co.* v. *Kemeny*, 271 Fed. 810, 816 (3rd Cir. 1921), and *Connecticut Importing Co.* v. *Frankfort Distilleries, Inc.*, 101 F.2d 79, 81 (2d Cir. 1939).

c. Nature of Relief Sought

Finally, the lower courts have found the *in pari delicto* defense inapplicable where plaintiff was seeking only an injunction to restrain enforcement of the illegal agreement in the future. *E.g., United Cigar-Whelan Stores Corp.* v. *H. Weinreich Co.*, 107 F.Supp. 89, 92-93 (S.D.N.Y. 1952), *The Gray Line, Inc.* v. *Gray Line Sightseeing Companies Associated, Inc.*, 246 F.Supp. 495, 500-01 (N.D. Cal. 1965). *Cf. National Transformer Corp.* v. *France Mfg. Co.*, 215 F.2d 343, 361 (6th Cir. 1954). Obviously, where the plaintiff repudiates and withdraws from participation in an illegal agreement and seeks merely to prevent its continuance, there is no reason in policy or law why such relief should not be granted.

3. Simpson v. Union Oil Co. and Later Cases

Petitioners, however, contend that *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), has abolished the defense of *in pari delicto* in antitrust cases. That is simply not so. The question of *in pari delicto* was not involved in *Simpson* and was not considered or passed upon either by the lower courts or by this Court.

Simpson had leased a service station from Union and had simultaneously been required to execute a "Retail Dealer Consignment Agreement" for purchase of gasoline from Union, under which Simpson was obligated to sell gasoline at prices fixed by Union. The consignment agreement automatically terminated upon termination of the lease. Upon expiration of the lease, Union refused to renew it because of Simpson's failure to adhere to the retail prices prescribed by Union. Simpson thereupon sued for profits lost during the lease term by virtue of inability to charge competitive prices, and for damages resulting from the

termination of Simpson's dealership. The district court granted summary judgment in favor of Union.

The Court of Appeals for the Ninth Circuit affirmed. 311 F.2d 764 (9th Cir. 1963). It assumed that Union's practices were illegal and confined itself entirely to the question of whether Simpson had suffered actionable damage. It concluded he had not because of the doctrine of *consent*. The court rationalized the matter thusly:

> "Simpson knew that by obtaining the lease he would also have to sign the consignment agreement. He had not previously been a lessee. He had freedom of choice to accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts.
>
> * * *
>
> "The law does not permit an individual to see and observe a tort violation and then to voluntarily put himself in a position where a tort cause of action would accrue and because of which he might become a litigant.
> "The Restatement on Torts, Sec. 892 states,
>
> > 'A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not entitled to maintain an action of tort for harm resulting from such conduct.' " 311 F.2d at 768.

The defense of *in pari delicto* was nowhere mentioned in the court's opinion and was simply not involved in the case. No contention had been made that Simpson had committed any illegal acts, or that he had sought to obtain or had obtained benefits from active participation in an illegal agreement. The sole point made was that because Simpson had merely *consented* to the imposition of the illegal restraint upon him, he had suffered no actionable wrong.

This Court reversed and remanded 377 U.S. 13 (1964). It "disagree[d] with the Court of Appeals that there

is no actionable wrong or damages," 377 U.S. at 16, held that there was a coercive agreement to achieve resale price maintenance, 377 U. S. at 17, and that "the fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws" 377 U.S. at 16.

This Court thus understood that the court of appeals' decision was based solely on the doctrine of "consent," and this Court understandably held that doctrine was not a defense to the action since it has been held to be against public policy to allow advance waivers of causes of action for future antitrust violation. *Fox Midwest Theatres* v. *Means,* 221 F.2d 173, 179-80 (8th Cir. 1955); *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.,* 39 F. Supp. 117, 119 (S.D.N.Y. 1941). Accord: *Gaines* v. *Carrollton Tobacco Board of Trade,* 386 F.2d 757, 759 (6th Cir. 1967).

But this Court's decision, limited to the question of consent, had nothing to do with the defense of *in pari delicto.* The two doctrines are separate and distinct. See "In Pari Delicto and Consent as Defenses in Private Antitrust Suits," 78 Harv. L.Rev. 1241, 1244, 1246-48 (1965). The term *"in pari delicto"* is not even mentioned in the Court's opinion or in any of the separate opinions. In none of the briefs was it contended that Simpson had committed any unlawful acts, or that he had sought or obtained any benefits from active participation in an illegal agreement. He was only alleged to have passively "consented" to an illegal restraint. The *Simpson* case, therefore, in no way disturbed the settled law of *in pari delicto.*

Nor has the doctrine been disturbed by any of the other cases cited by petitioners, such as *United States* v. *Arnold,*

Schwinn & Co., 388 U.S. 365 (1967), *Goodyear Tire and Rubber Co.* v. *F.T.C.*, 331 F.2d 394 (7th Cir. 1964), *F.T.C.* v. *Brown Shoe Co.*, 384 U.S. 316 (1966), or *Sun Oil Company* v. *F.T.C.*, 350 F.2d 624 (7th Cir. 1965), which were all government cases and therefore obviously could not have involved questions of defenses to a private action, or *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961); second opinion, 324 F.2d 566 (4th Cir. 1963), which involved neither consent nor *in pari delicto*, since the dealer had never voluntarily signed or entered into any agreement regarding the restrictions sought to be imposed.

It is therefore clear that *in pari delicto* has continuously remained a valid defense in antitrust cases, and remains to be given effect in a proper case.

C. The Defense Is Clearly Applicable On The Facts Of This Case

1. All Elements Of The Defense Are Present

Petitioners complain of the Midas franchise system of distribution as violative of the antitrust laws. That system must be viewed as a whole and in its entire context, not in separate, unrelated pieces as petitioners would have this Court do.

As set forth in the Statement, *supra*, pp. 7-13, prior to the Midas concept, automotive exhaust parts were sold by conventional methods of distribution. Three plaintiffs, Pierce, Ross and Skarupa, had been purchasing such parts from International Parts under the old system free of any alleged restraints. They voluntarily embraced the new Midas franchise system of distribution which included, among other things, the creation of a new "image" for

sales and installation of exhaust parts under the trade marks and service marks "Midas" and "Midas Muffler Shops," the formation of a nationwide network of franchised shops operating under that image and supported by extensive national advertising, and promotion of a unique nationwide guarantee.

It has been admitted, solely for purposes of the motion for summary judgment, that this system of distribution carried with it certain restraints. Each franchisee was initially assigned an exclusive territory, and Midas agreed not to franchise any other party within that territory. As a corollary, no franchisee was to operate outside his exclusive territory. In order to avoid any conflict with the national image sought to be created, they agreed to sell only to consumers and that all franchisees would maintain uniform resale prices, and that they would stock only genuine Midas products (A36-45).

Each of the plaintiffs had a vital stake in the maintenance and growth of this system, including the alleged restraints which were an integral part thereof. Plaintiffs helped formulate the program and were among the very first franchisees in the newly conceived program. From the beginning they sought to suppress competition and create for themselves a monopoly in their respective areas. Pierce went into the program "so as not to invite competition;" Skarupa wanted to appropriate exclusively the entire Washington, D.C. metropolitan area and attempted to exclude the entry of any other franchisee therein; Ross sought the same with respect to the entire State of Michigan; and Wheeler actually terminated when Midas franchised another dealer in his area, offering to return only if the proposed competition were eliminated (Statement, *supra*, pp. 8, 14, 15, 16-17, 20-21).

The restrictions on resale allegedly imposed against plaintiffs were merely the corollary of the exclusivity they desired. The system could work only if each franchisee respected the territory and customers of each other franchisee. If the system called for keeping others out of their territories, it correspondingly required keeping them out of the territories of others.

The benefit of resale price maintenance also flowed to plaintiffs. Without competition in large expanses of territory, they were free to maintain higher prices. But since Midas was nationally advertised, and since the Midas guarantee was good at any Midas Muffler Shop in the country, plaintiffs could protect their price shelter only by a system whereby all other franchisees agreed to maintain the same prices.

And because of their commitment to a system which through national advertising held out to the public a network of automotive exhaust system *specialists*, it was essential to plaintiffs that no single member of that system destroy the concept or the image by carrying products or operating in a manner incompatible with it. A motorist from Washington who, while visiting another city, had dealt with a Midas shop there operated like an alley mechanic's garage, would not be likely again to patronize a Midas shop in Washington.

Each of the plaintiffs actively sought to protect his stake in the maintenance and growth of the franchise system, including its alleged restraints. As detailed in the Statement, *supra*, pp. 15, 16-17, 20-21, each vigorously re-

sisted any attempt to encroach upon the exclusive territory he sought to protect. Each sat on the National Advisory Council of Midas dealers, participating in and voting upon the formulation of franchise policies. Included among the topics discussed and acted upon at these meetings were resale price maintenance, restrictions on sales to wholesale customers, restrictions on sale of shock absorbers, springs, and other allied automobile parts, and revisions of franchise agreements in regard to territory. Some of the plaintiffs contributed articles to the "Dealer Dabbler", circulated among all Midas franchisees, and some were active in recruiting new franchisees into the program. Each spent substantial sums on advertising the Midas image and concept inherent in the franchise system of distribution.[17]

Of extreme significance is the fact that plaintiffs eagerly continued to seek and obtain additional Midas franchises for periods of up to three and a half years after their initial franchises.[18] There is not a shred of evidence that any plaintiff ever sought to have any of the now complained of restrictive provisions deleted from these additional franchises. On the contrary, they vigorously resisted defendants' attempts to delete the provisions regarding exclusive territories.

Only after plaintiffs became disgruntled with the reduction in guarantee credit and were offered an opportunity

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[17] See Statement, *supra*, pp. 9-11, 18 and Argument, *infra*, note 25, p. 61.

[18] Paragraph 22(M) of the complaint (A 25) alleged that defendants "consistently denied" plaintiffs' repeated requests for additional franchises.

by a competing franchise program to gain exclusive rights in even larger territories did they exercise their ever-present right to unilaterally terminate their Midas franchises.

In sum, each of the essential elements of the *in pâri delicto* defense which we have set forth at page 36, *supra*, was established on the undisputed facts in this record:

1. *Plaintiffs and defendants voluntarily entered into allegedly illegal franchise arrangements hoping and expecting to profit thereby.* If—as was admitted solely for purposes of the motion for summary judgment—the Midas franchise system was illegal, then plaintiffs, having voluntarily entered therein in hopes of benefitting from that illegality, were equally guilty thereof.[19]

2. *Plaintiffs helped to formulate, fostered and participated in the program, and did in fact benefit and profit by operating under the agreements for their entire duration.* We have shown above that plaintiffs had an active stake in the franchise system and agreements, including the restraints included as an integral part thereof. They did not passively "submit" or merely "consent" to these provisions; they sought personal benefit and profit therefrom as active participants in and proponents of the

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[19] Petitioners' Argument (PB 35-36) that even if they are *in pari delicto* under Section 1 of the Sherman Act, they could not be *in pari delicto* insofar as Section 3 of the Clayton Act is concerned is spurious. It is plaintiffs' active involvement in the totality of the scheme of interrelated and interdependent restraints allegedly comprising the Midas franchise system which places them *in pari delicto*.

system. There can be no doubt that they profited enormously from operation under this system for the entire period of their involvement in it.[20]

3. *Plaintiffs subsequently became disappointed with the amount of profit and benefit obtained, concluded that they would have profited more if they had been able to operate free of the franchise agreements, and thereupon brought a suit for treble damages.* The record clearly shows that after entering, fostering, and enjoying the fruits of the alleged illegal system, plaintiff had a change of heart, impelled principally by the reduction in guarantee credit, the frustration of their desire to monopolize larger territories, and the offer of a competing franchise. They thereupon concluded they would have made even more profit had they operated free of the franchise agreements, and brought this suit for treble damages.

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[20] Skarupa's annual salary of $44,000 for 1958 exceeded his total personal income for all of the six years prior to Midas; he enjoyed personal and corporate profits of $182,763.31 from a personal investment of $9,800 in his four years with Midas (A 83). Ross more than doubled his 1955-56 fiscal year earnings in his first full year and took home over $154,000 in profits during his Midas years (A 90-91). Pierce's coterie of corporations and enterprises made it difficult to ascertain his personal profits from Midas, but he has never denied the $180,000 attributed to him for his three and a half Midas years (A 97-98). Wheeler's wages of $6,000 in 1955 became $29,000 as a Midas operator in 1957; additional corporate income netted him close to $100,000 before he switched to a competitive franchise (A 104).

2. None of the Exceptions to the Doctrine is Applicable

(a) *Coercion*

There is no evidence in this record that any of the plaintiffs entered their franchise agreements under coercion.[21] Petitioners suggest (PB 7) that there was coercion because Midas refused to enter into franchises on any other terms, and that Pierce was told he would face competition if he did not sign. But no case has ever held that a seller's unilateral offer of terms of sale, leaving the buyer free to accept or reject, amounts to coercion sufficient to vitiate *pari delicto* whether or not the seller states that the same terms will be offered to others if the buyer rejects. And if there could be any doubt about the lack of coercion, it is laid to rest by the eager grasping of each plaintiff for more and more franchises, continuing for many years after the execution of his initial franchise.

To the extent petitioners mean to suggest that even though they were not coerced in entering into the franchise agreements, they were "victims" of and not "participants" in the program, the suggestion cannot be reconciled with the undisputed facts. Under the cases (see pp. 42-43, *supra*), one is considered a "victim" of illegal restraints only when he has nothing to gain from agreeing to them, the sole benefit thereof flowing to the defendant. Such is not the case here. As shown above, each plaintiff helped initiate, had a vital stake in, and sought to benefit from the Midas franchise system, including the restrictive provisions which were an integral part thereof. They sought, fostered, and helped to formulate those very restraints as well as the

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[21] Both courts below found that "coercion" is not "a factor herein" (A 211, 110).

system of which they were a part. They were clearly "participants" and not "victims."

Petitioners further seem to suggest that *Simpson* v. *Union Oil Co.,* 377 U. S. 13 (1964), has redefined the concept of coercion as an exception to *in pari delicto.* Actually, as explained above, that case did not involve a defense of *in pari delicto* at all, but only the question whether consent was a defense. Since this Court found that consent was not a defense, and since Union never suggested that Simpson had actively engaged in illegal conduct such as to place him *in pari delicto*, the Court had no occasion to consider whether Simpson was coerced into the illegal agreement so as to vitiate any *in pari delicto* defense. The coercion of which the Court spoke was not coercion bringing about the original agreement, but that inherent in the restrictive agreement itself.

It is noteworthy, however, that Simpson *did* allege he had been coerced into entering into the consignment agreement upon pain of being denied a lease of the real estate. Even that coercion could not be implied in this case. When Simpson's agreement was terminated by Union Oil, he also lost his lease and was out of business completely; contrariwise these plaintiffs all continued in business at the same locations (A 81-82, 89-97, 101-103) with a competitive franchise after they terminated Midas and without changing "the physical facilities in any way other than to change the signs and that type of thing" (A 131). Skarupa even advertised, "I'm still doing business at the same old stands" (A 169-70).

Nor is there any "coercion" by virtue of disparities in size and bargaining power. Midas, which introduced its

new and different program in the automotive parts field in 1955 and which by 1959 had total sales of only $9 million and 268 dealers throughout the United States, is not comparable to Union Oil with sales substantially in excess of $347,900,000 and with 3,305 gas stations in just ten states. Plaintiffs' bargaining power here is also demonstrated by their unilateral total cancellation of Midas. Unlike Simpson, Osborn, Lessig and Bales in the plaintiffs' authorities,[22] the Midas dealers were not trying to continue their relationship with a dominant supplier. It was Midas in this case whose chief executive even made a special trip to St. Louis in an unsuccessful effort to keep the dealer, Wheeler, in the program (A 102-103).

(b) Withdrawal

Nor can petitioners take advantage of the cases which hold that an originally voluntary and active participant in an alleged conspiracy may recover damages for such period as he suffered from its restraints *after* he has completely and effectively withdrawn from it. *Victor Talking Machine Co.* v. *Kemeny,* 271 Fed. 810, 816 (3d Cir. 1921); *Connecticut Importing Co.* v. *Frankfort Distilleries, Inc.,* 101 F.2d 79, 81 (2d Cir. 1939). These cases require that plaintiff's withdrawal be total, complete, and effective. A party may not repudiate those provisions of an agreement to which he objects and still seek to enforce those provisions which he finds beneficial. *Cf. Ring* v. *Authors' League of America,* 186 F.2d 637, 643 (2d Cir. 1951). Here, assuming some of the plaintiffs sporadically sought to

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[22] *Simpson* v. *Union Oil Co.,* 377 U.S. at 15; *Osborn* v. *Sinclair Refining Co.,* 286 F.2d at 834; *Lessig* v. *Tidewater Oil Co.,* 327 F.2d at 463; *Bales* v. *Kansas City Star Co.,* 336 F.2d at 441.

ignore certain of the restrictive provisions, none of them ever sought to repudiate the franchise agreements in toto or even all the restrictive provisions theerof. Rather, they sought to continue to enjoy the benefit of such restrictive and other features of the system as suited them and indeed are now claiming damages for not being permitted to obtain more of them (A 49).

3. Application of the In Pari Delicto Doctrine Here Is Consistent with the Policy of the Antitrust Laws

All the reasons which support the doctrine of *in pari delicto* apply with full force to the facts of this case. First, it would be abhorrent to this Court to lend its aid not only to relieve wrongdoers from the consequences brought about by their own deliberate, voluntary, illegal acts, but to reward them threefold therefor. Second, to award damages would ignore the mandate of Section 4 of the Clayton Act that plaintiffs' damage must occur *"by reason of* anything forbidden in the anti-trust laws." Any damage to plaintiffs from the alleged illegal system resulted as much from their own participation therein as from defendants; thus it cannot be said that defendants' acts are the proximate cause of any such damage. Finally, to afford relief to plaintiffs would defeat the very policies of the antitrust laws which they purport to be enforcing, for it would encourage persons to become active participants in illegal schemes, knowing that if the scheme should work out disappointingly, they could recover three times their alleged losses.

Petitioners' professed fear that the decision below will foreclose all franchisees from ever suing their franchisors for antitrust violations is a *reductio ad ab-*

surdum as also are the contentions that the decisions below "constitute a privately created exemption" for all "franchisors" from Section 4 of the Clayton Act (PB 31), "destroy Section 4 as a weapon for enforcement" of the antitrust laws (PB 33) and deny the benefits of the antitrust laws to one of the very classes they were "designed to protect" (PB 35). Where the franchisee is subject to coercion, or merely passively consents to a restrictive scheme in which he has no active or beneficial stake, or if he does not (unlike these plaintiffs) aid in the formation of, participate in, further and profit from the scheme, the defense of *in pari delicto,* of course, will not be applicable.

Section 4 of the Clayton Act enlists ". . . the *sufferer* to aid in enforcement of the statute," *Bruce's Juices, Inc.* v. *American Can Co.,* 330 U.S. 743, 757 (1947). It was not designed to protect a joint venturer in an alleged illegal arrangement or to allow a persistent participant in such an arrangement to reap the windfall of treble damages when his avarice is no longer being satisfied by his active pursuit of the allegedly condemned practice. Private antitrust suits are designed to help deter violations of the antitrust laws. That purpose is better served by denying recovery to those persons taking part in illegal schemes than by permitting them to take more monies from such participation which would in turn be trebled. As stated by the court below:

> "Virtually every dealer, *particularly* plaintiffs enjoyed substantial monetary gains from *participation* in the Midas program. . . . They voluntarily *acceded* to, *fostered* and *profited* from the very practice about which they now complain. . . . It would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine." (A 207, 211, 215).

II. THE MERITS OF THE MIDAS FRANCHISE AGREEMENT ARE NOT AT ISSUE HERE

Petitioners argue throughout their Statement of the Case (PB 5-9, 13-14) and in their Argument (PB 19-25) that the restrictions of the Midas franchise agreements were all illegal *per se*, that they resulted in a tying agreement which was also illegal *per se*, and that because of them and the change in procedures so that plaintiffs shared 50% of the cost of the Midas guarantee, plaintiffs were somehow damaged under the antitrust laws and eventually forced to leave the Midas program. Not only are these arguments irrelevant with respect to the question of whether plaintiffs were *in pari delicto*, but they are also untrue factually and unsound legally.

A. The Franchise Agreements

The undisputed facts are that from 1955 to 1959 three forms of Midas franchise agreements were in use, one or more of which was executed by each of the plaintiffs, and which were attached as Exhibit A to the complaint (A 36-45) and as Appendices A and B to the corporate defendants' answer (R 63-68, 69-75). These forms outlined the terms and conditions under which the defendants licensed plaintiffs to use defendants' trademarks and service marks incorporating the word "MIDAS,"[23] the validity of which the plaintiffs and all other franchisees specifically acknowledged (A 38). The provisions of the fran-

[23] The first "Midas" trademark covered "Mufflers for internal combustion engines and parts thereof — namely, tail pipes, exhaust pipes, and muffler clamps" (A 106). The "Midas" service mark was registered for "Inspection of automotive exhaust systems and installation of automotive mufflers and exhause system parts" (A 107).

chise agreement concerning the location from which the dealers sold; the handling, without Seller's consent, of competing goods; the owner's devotion of full time to the business; the purchase of a minimum opening stock of merchandise; and the maintenance of retail prices (set forth at PB 6) were included with some modifications in the three forms of franchise agreement initially used. The fourth form of the franchise agreement in use since February 1960 contains none of these restrictions. This form was identified as plaintiffs' Exhibit No. 1 at the deposition of Gordon Sherman and is reprinted as Appendix B hereof.[24]

In answer to plaintiffs' counsel's specific questions with respect to why the form of franchise was changed in February 1960, Gordon Sherman explained that the new form "reflected our relationship with our customers" and better "described the circumstances of our association" (Sherman Dep. 31-32). The accuracy of Mr. Sherman's characterization is substantiated by the testimony of plaintiff Pierce who continued to sell shocks and springs from most of his locations throughout his time with Midas (Pierce Dep. 98-101, 146-47, 198-200, 318-20). He explained:

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[24] It is difficult to understand how petitioners can now represent to this Court (PB 14) that, as of August 1960, there were 350 Midas franchises containing exclusive dealing and resale price maintenance provisions when on March 20, 1961 plaintiffs were furnished (pursuant to subpoena duces tecum) with the identity of all Midas dealers and the form of franchise agreement under which they operated. Of the 297 identified shops, 275 had the new franchise which contained no such provisions and which specifically canceled the old franchises which did contain them (Appendix B, p. 10, *infra*).

"I knew it was [prohibited] in the contract and they knew it, but I did not feel it applied to me . . ." (Pierce Dep. 162).

His complete and only discussion with Mr. Gordon Sherman as to pressure on Pierce to drop shocks and springs occurred during the former's visit to Mr. Pierce's places of business as follows:

"A. . . . I said, 'Gordon, now how about this shock and spring business? I am sitting right on top of a fence, and if this continues, I will have to go one way or the other.'

"He said, 'Joe, I will never tell you not to sell shocks and springs.' And I guess that was just about it, as well as I remember the conversation" (Pierce Dep. 163).

Thus, although plaintiffs did not operate under the current unrestricted Midas franchise form which has been in effect since 1960, their business was conducted in a manner which reflected the provisions of these new agreements rather than those cited in Petitioners' Brief (PB 6).

As to the legality of the 1955-59 franchise provisions, defendants submit that plaintiffs, after signing a franchise and becoming a part of the program, had no right to operate a Midas Muffler Shop as an alley mechanic's shop, installing both general automotive parts and non-Midas exhaust system parts despite the public's reliance for Midas quality on the Midas name, the Midas guarantee and the Midas exhaust system specialization. The conditions governing the operations of a Midas Muffler Shop were reasonable and necessary, as a matter of law, to assure the American motorist that he would find the products and

services which the Midas advertising represented would be obtained at a "Midas Muffler Shop."[25]

In the *Carvel* litigation, a nationwide system of franchised retail dealers in the soft ice cream industry was tested under the antitrust laws, with the district court, the court of appeals, and subsequently the Federal Trade Commission, holding that the Carvel franchise agreement and its merchandising methods were not proscribed by Section 3 of the Clayton Act. *Susser* v. *Carvel Corp.,* 206 F.Supp. 636 (S.D.N.Y. 1962), *aff'd,* 332 F.2d 505 (2d Cir. 1964); *cert. dismissed as improvidently granted,* 381 U.S. 125 (1965); *Carvel Corp.,* [1965-1967 *Transfer Binder*] Trade Reg. Rep. ¶ 17,298 (FTC July 19, 1965).

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[25] Plaintiffs joined in the Midas national advertising and voluntarily saturated their marketing areas with their own local advertising to gain for themselves the benefits of the Midas image (A 79-80, 87-88, 94-95, 101). These ads demonstrated to the court of appeals plaintiffs' "participation in and co-operation with the defendants in the programs of which they now complain" (A 210-11) and also demonstrate the identification of the Midas trade and service marks and the Midas trade name with all parts of automotive exhaust systems, not just mufflers, and the unique desirability of the Midas guarantee good anywhere in the United States. Typical examples of plaintiffs'. advertisements:

> "Look for the MIDAS Sign — America's only coast-to-coast network of exclusive auto muffler shops" (A 50).
>
> "You get only nationally-advertised Midas products. . . . " (A 53).
>
> "We're specialists in just *one* thing . . . your car's exhaust system . . . ." (A 50).
>
> " . . . and always depend on MIDAS muffler tailpipes & dual exhaust systems for complete safety" (A 50, 51).
>
> "Your MIDAS muffler carries a written factory guarantee good from coast-to-coast!" (A 50, 51).
>
> "[Y]ou can depend on MIDAS for the world's finest mufflers, tailpipes and exhaust systems . . ." (A 52).

What the courts said there is equally applicable to the Midas franchise program:

"The franchise system creates a class of independent businessmen; it provides the *public with an opportunity to get a uniform product* at numerous points of sale from *small independent* contractors, rather than from employees of a vast chain. The *franchise system of operation is therefore* good for the economy.

"However, the *cornerstone of a franchise system* must be the *trademark or trade name of a product.* It is this *uniformity of product and control of its quality and distribution* which causes the public to turn to franchise stores for the product." 206 F.Supp. at 640

* * *

"The requirement that only Carvel products be sold at Carvel outlets derives from the desirability that the *public identify each Carvel outlet as one of a chain which offers identical products at a uniform standard of quality. The antitrust laws certainly do not require that the licensor of a trademark permit his licensees to associate with that trademark other products unrelated to those customarily sold under the mark* . . . ." 332 F.2d at 517.

See also: *Engbrecht* v. *Dairy Queen Co.*, 203 F. Supp. 714, 719-20 (D. Kan. 1962).

B. Alleged Tying Agreement

Petitioners imply in their instant brief (PB 7-8, 13-14, 20) that they are not claiming damages based on their purchases of the Midas muffler,[26] but they argue that the vice of the Midas program was that they were required

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[26] In their Reply to the Brief in Opposition (p. 5), they were more direct:

"Petitioners, for example, have never claimed and do not now claim that there was anything unlawful about their purchases or sales of the Respondents' MIDAS muffler alone."

to also purchase tail pipes, exhaust pipes and clamps from the defendants. Apart from the indisputable record fact that plaintiffs are claiming direct damages from the purchase of the Midas mufflers alone (Plaintiffs' Answer to Interrogatories, Ross, R 899; Skarupa, R 449; Wheeler, R 793; Pierce, R 617) and apart from the fact that the Midas trade and service marks did cover tail pipes, exhaust pipes and clamps as well as the muffler (A 106-07), this Court has made clear as recently as *White Motor Co.* v. *United States,* 372 U.S. 253 at 262-63 (1963), that there is nothing illegal *per se* about this type of arrangement. Mr. Justice Douglas reviewed the decisions in *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1 (1958), and *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), and noted that in those decisions the Court had determined that tying arrangements were not illegal *per se* but that each must be judged in the circumstances of the particular case. They are not illegal in the absence of "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" (372 U.S. at 262) and, in addition, the tying device could be employed "by a small company in an attempt to break into the market" (372 U.S. at 263). The uncontested evidence of the small size of Midas sales[27] in

[27] Petitioners' attribution of $17 million in sales and 350 Midas Muffler Shops in 42 states to the "Respondents" in August 1960 (PB 14) is seriously misleading in that it ignores the early years of 1955-1958 when Midas was attempting to enter the market and states the wrong sales figures for the later years (See Statement, *supra,* pp. 12-13). The only record information indicates that Midas brand sales amounted to $8 million in 1959 and $9 million in 1960 (Jacob Dep. 170). Likewise, there were only 297 Midas Muffler Shops in operation in March 1961 (See Argument, *supra,* note 24, p. 59), only 258 in operation when plaintiffs terminated their franchises (A 72) and only 120 in operation in 1957 (A 71).

comparison with the giants in the automotive business, and of the introduction and evolution of the Midas program in the automotive parts market conclusively establish that Midas meets both these conditions.

C. The Guarantee

The unique guarantee of replacement of any Midas muffler at any Midas Muffler Shop throughout the nation was an attraction of the Midas program which "excited" consumers as well as the dealers; *e.g.*, Mr. Ross (A 138), and it was the dealers who insisted on promoting it as a sales tool and integral part of the program (Statement, *supra*, p. 11-12). As a result of this dealer pressure, defendants continued to underwrite 100% of the guarantee replacement expense until January 1, 1959. At a meeting with the National Advisory Council in Chicago in November 1958, defendants suggested to the dealers that if the dealers were willing to share this burden on a 50-50 basis, the defendants would use the proceeds of this change to provide a heavier gauge muffler with a longer anticipated life. At that time Mr. Pierce, who said he was present at the meeting, thought that "this was a good idea," (Pierce Dep. 173), but he and others did not think that the change should apply except to further replacements of the new muffler which became generally available in January of 1959 (Pierce Dep. 171-73). Naturally the dealers were not eager to share the replacement burden, but the decision was adopted by the National Advisory Council as an economic fact of life. To now describe this course of action as "reneg[ing] on their original promise" or as a "unilateral" change in the guarantee (PB 5, 13) con-

tradicts plaintiffs' own testimony and other undisputed facts in the record.[28]

Moreover, if it is true, as petitioners allege, that it was the change in the expense of the guarantee which caused a "Reappraisal of Program" by the petitioners (PB 13), any claim for damages for violations of the antitrust laws automatically fails. No allegation is or could be made that the guarantee program standing alone constituted a violation of Section 1 of the Sherman Act or Section 3 of the Clayton Act. By not "reappraising" their part in the Midas program until the change in the guarantee, plaintiffs acknowledge that up to that time they were totally committed to and participated without qualification in that program. They now make clear that they were not really complaining of the franchise restrictions alleged to be in violation of the antitrust laws because all these restrictions had been in effect long before January 1959. The fact is that plaintiffs, both before and after the change, wanted more, not less, of the Midas franchises. Wheeler and the other plaintiffs were not satisfied with their financial success as Midas dealers; they wanted "exclusive franchises" to protect their monopolies beyond their respective marketing areas—Ross for all of Michigan; Skarupa for the entire Washington, D.C. area; Wheeler for Metropolitan St. Louis; and Pierce for all of central New York state.

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[28] Contrary to petitioners' assertions (PB 5, 13), none of the forms of contract contained any provision for a continuing 100% guarantee of the Midas muffler by the defendants. The franchise provided only that "Seller agrees, during the continuance of this agreement, to replace and/or adjust to the Buyer any merchandise purchased from the Seller by the Buyer within the limits of such specific guarantees as Seller furnishes" (A 42-43).

They decided they no longer needed the Midas trademarks, service marks and other Midas aid and assistance to operate their business and they wanted to include in their operations the sale of allied automobile products and the passing off of inferior and cheaper goods as those of the trademark they represented. When the ex-Midas field counselor offered them this opportunity with the Robin Hood program they abandoned Midas and embraced his offer. Robin Hood gave them the exclusive franchises in all the territory which they wished to monopolize and allowed them to do everything they claimed Midas prevented them from doing, but with "Robin Hood" instead of the "Midas" name and guarantee. In the Robin Hood program, despite the addition of sales of allied automobile products, cheaper mufflers, and brake and front end service to his operations, each plaintiff's sales declined and profits likewise gradually diminished and eventually disappeared (A 81-82, 89-90, 97, 101-104). However, instead of convincing them of the wisdom of the Midas approach and the Midas program, this disappointment in the benefits of Robin Hood led to an increased hostility to Midas and eventually to the initiation of this antitrust treble damage suit.

D. Reasonableness of the Midas Program

The issue of the reasonableness of the Midas franchise plan was included in defendants' motion for summary judgment (A 62-62a), but not ruled upon by either court below (A 216) since the *in pari delicto* defense would apply even if the program were illegal. Defendants are not arguing the matter at this time except to demonstrate defendants' good faith and to correct any impression, which

plaintiffs with the benefit of hindsight[29] have attempted to create, that the defendants intended at any time to violate any antitrust or any other law.

The issue here is not, as it might be in a government case, whether the 1955 Midas franchise is *now* illegal under the 1968 interpretations of the statutes. The issue is solely whether these plaintiffs in the circumstances of this case as they existed from 1955 to 1959 should be permitted to obtain still more profits in addition to the substantial amounts they enjoyed from their Midas operations during those years; it is the facts *and the law* which existed as of that time which should determine that issue. Defendants amended their franchise agreements in February 1960 *before* this Court's decision in *Parke, Davis* and the other cases on which petitioner relies, *before* this complaint was ever filed and *before* any threats or promises of such actions by the plaintiffs. The change was made *before* the Cleveland, Ohio grand jury investigation of the automobile replacement parts industry culminated in 1960 in the civil complaint in *United States* v. *The A P*

[29] The first Midas contracts were executed almost nine years and the complaint was filed four years prior to this Court's decision in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); and, of course, the other cases such as *United States* v. *General Motors*, 384 U.S. 127 (1966) and *United States* v. *Schwinn*, 388 U.S. 365 (1967) relied on most extensively by the plaintiffs, were not decided until some seven years after plaintiffs had left the Midas program. Even *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) had not been decided when plaintiffs cancelled their contracts and, in fact, of the 39 authorities listed by the plaintiffs in their Table of Citations, no less than 24 bear dates subsequent to the filing of the complaint herein and only three of the eleven cases cited as authority for the illegality of the contracts (PB 19) were decided prior to 1959.

Parts Corp. and Goerlich's Inc., Civ. No. 8541, N.D. Ohio W.D. (Nov. 10, 1960) cited by petitioners (PB 14). Representatives of International Parts testified before, and its documents were presented to, that grand jury. However, no action was filed against the defendants even though the civil action commenced against one of its larger competitors alleged among other things illegal exclusive arrangements with dealers. Since that date the Antitrust Division of the Department of Justice has regularly requested information concerning Midas operations, and as recently as October 1967, the current franchise which differs little from Appendix B was furnished to and reviewed by the Division. To the extent relevant here, the reasonableness of the Midas franchise program has been established and petitioners should not be allowed to divert attention from the basic issue of their own participation in the founding, development and growth of the Midas program so as to render them *in pari delicto.*

III. DISMISSAL OF COUNT ONE ON THE ALTERNATIVE GROUND THAT THE ACTIONS OF THE DEFENDANTS HERE WERE THOSE OF A SINGLE INTEGRATED BUSINESS ENTITY WAS CORRECT

Nowhere in petitioners' discussion of the alleged error of the courts below with respect to the alternative ground of dismissal is there a single citation to the record (PB 38-40) although the brief contains numerous unsupportable assertions. As the trial court reminded the plaintiffs (A 111), and as made clear in the following section, Rule 56 on summary judgments and the decisions interpreting it re-

quire more than assertions of counsel to avoid judgment when as here, the motion was supported by affidavit and other evidence.[30]

What is in the record is the uncontradicted affidavit of the two principal individual defendants, chief executive officers of the corporate defendants, who unequivocally state that they "owned or controlled" "each of the corporate defendants" and that they "jointly managed the corporate defendants and directed the activities which the other individual defendants performed for International Parts, by whom they were employed and paid" (A 65). The affidavit also establishes that Midas, Inc., had no employees and sold no products and was merely the corporate shell to hold the rights to the Midas trademarks, trade names, service marks and franchise agreements for its parent, International Parts (A 67). Muffler Corporation was a manufacturing subsidiary and Powell Manufacturing was a distributing subsidiary and without dispute neither of them had any contact with, relationship to, or effect upon the plaintiffs (A 65).

Apparently recognizing that it is an "absurd assertion" that these individual defendants, acting only in their normal employment capacities were conspiring or that such

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[30] Rule 56(e) (App. A) provides in part:

"When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials* of his pleading, but *his response, by affidavits or as otherwise provided in this rule, must set forth specific facts* showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In *White Motor Co.* v. *United States,* 372 U.S. 253, 254-55 (1963), the Court explains that the 1963 amendment added a more stringent requirement and imposed a greater burden for those opposing summary judgment.

activities constitute conspiracy, *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), plaintiffs abandoned that argument in the court of appeals (Appellants' Brief, pp. 34-36; Appellants' Reply Brief, pp. 6-7, No. 15862 (7th Cir. 1967). They now attempt to revive this contention and continue to insist that a conspiracy existed among the wholly-owned subsidiaries (PB 38-39). However, both their factual assertions and their legal conclusions are unfounded.

Hundreds of pages of deposition testimony and the Sherman affidavit contradict the petitioners' assertion that Midas, the corporate shell, sold or refused to sell Midas brands to International brand customers (PB 38); Midas sold no goods (A 67). Likewise, the contention that International would not sell International brand mufflers "to the Midas franchisees" is conclusively refuted by Pierce's testimony, quoted at length in the Statement, *supra*, p. 18, that he bought International mufflers for his retail business all during his Midas period (A 92).

Similarly unsubstantiated is the assertion that somehow Midas and International held themselves out as "competitors" or as "separate and 'divorced'" (PB 38-39).[31] Nothing could be farther from the fact as clearly established by the allegations and legal theory in Count Three of the complaint. Only International Parts sold or purchased goods, had a payroll, or dealt with plaintiffs or other purchasers of exhaust parts and it was on the basis of this known and undisputed fact that plaintiffs claimed, in Count Three, that a single seller, International Parts,

[31]As the district court said and the court of appeals adopted:

"There is no evidence, except in plaintiffs' unsupported arguments that these corporations competed with each other or acted in any manner other than as a single integrated business." (A 112-13, 215).

sold to Midas dealers at a different price than it sold to its other purchasers. International Parts did sell two brands of mufflers—International and Midas—but to the extent possible to two different classes of trade—jobbers or wholesalers for International—installers for Midas. There was no national advertising or promotion of the International brand even remotely approaching the Midas concept and defendants never provided International customers with any of the benefits of the Midas program. Nothing in this record supports an assertion as to the existence here of a horizontal conspiracy of the type condemned in *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.*, 340 U.S. 211 at 215 (PB 39).

Defendants have never contended that, solely because of the common ownership and control of the corporate defendants, they were immune from the antitrust laws. But as the Court pointed out in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 at 227 (1947) on which *Kiefer-Stewart* depends:

> "The corporate interrelationships of the conspirators, in other words, are *not determinative* of the applicability of the Sherman Act. That statute is aimed at *substance* rather than form."

Here, the *substance* of the corporate relationships is undisputed—a single family-owned and operated business entity using several corporations.[32]

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[32] Cases since *Kiefer-Stewart* holding that an integrated enterprise cannot combine or conspire with itself include the following: *Alpha Distributing Co.* v. *Jack Daniel's Distillery,* 207 F.Supp. 136, 137-38 (N.D. Cal. 1961), *aff'd,* 304 F.2d 451 (9th Cir. 1962); *Schwing Motor Co.* v. *Hudson Sales Corp.,* 138 F.Supp. 899, 905-907 (D. Md. 1956), *aff'd,* 239 F.2d 176 (4th Cir. 1956), *cert. denied,* 355 U.S. 823 (1957); *Hudson Sales Corp.* v. *Waldrip,* 211 F.2d [illegible] 273 (5th Cir.), *cert. denied,* 348 U.S. 821 (1954).

If plaintiffs had any evidence to contradict the affidavit of Nathan and Gordon Sherman, it should have been presented in a counteraffidavit or by other record material.[33] Their failure to do so, coupled with the failure of any plaintiff to profess any knowledge of facts concerning the alleged conspiracy in his deposition (A 84, 91, 98, 105), which testimony has not been denied, supplemented, or explained, conclusively established that there is no genuine issue of any material fact and that summary judgment on the Sherman Act allegations was the proper remedy, *Markwell* v. *General Tire & Rubber Co.,* 367 F.2d 748 (7th Cir. 1966); *S & S Logging Co.* v. *Barker,* 366 F.2d 617, 622-23 (9th Cir. 1966).

Thwarted by the district court in their attempt to fragmentize by pleadings and unfounded assertions "a unified business to meet the conspiracy requirements of the Sherman Act" (A 113), plaintiffs shifted their position in the court of appeals to contend that the franchise contracts with plaintiffs themselves constituted a combination in restraint of trade. The same digression is made here (PB 40). However, plaintiffs cannot deny their allegations in Count One of a horizontal combination or conspiracy among the defendants and "other co-conspirators *unknown*" (Statement, *supra,* p. 4; A 17), a description which patently did not refer to plaintiffs and the other known franchisees.

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[33] Plaintiffs took extensive depositions of Gordon Sherman and other officers of defendants. Although these depositions exhaustively covered the defendants' intracorporate activities, plaintiffs never offered any of this deposition testimony.

IV. SUMMARY JUDGMENT WAS APPROPRIATE IN THIS ANTITRUST SUIT SINCE NO DISPUTED MATERIAL FACTS EXIST

"Summary judgments have a place in the antitrust field, as elsewhere . . .," *White Motor Co.* v. *United States,* 372 U.S. 253, 259 (1963),[34] albeit their use is limited in "complex antitrust litigation where motive and intent play leading roles . . . [and] the proof is largely in the hands of the alleged conspirators." *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962).[35] But motive and intent play no role in the factual or legal issues of the *in pari delicto* defense here asserted, nor does the proof lie with the alleged conspirators.

The only material issues are the franchise agreements

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[34] This has also been recognized by the lower courts: *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.,* 306 F.2d 61, 64-5 (3d Cir.), *cert. denied,* 371 U.S. 951 (1962); *United States* v. *Johns-Manville Corp.,* 237 F.Supp. 885, 892-93 (E.D. Pa. 1964); *Cohen* v. *Curtis Publishing Co.,* 31 F.R.D. 569, 575 (D. Minn. 1962), *aff'd,* 312 F. 2d 747 (8th Cir.), *cert. denied,* 375 U.S. 850 (1963); and *Bond Dist. Co.* v. *Carling Brewing Co.,* 32 F.R.D. 409, 415 (D. Md. 1963).

[35] None of petitioners' cases other than *Poller* (PB 41) considered the appropriateness of summary judgment, and thus are inapplicable here. In *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964) and *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), summary judgments were reversed on matters of substantive law, but the Court did not question the procedure. A motion to dismiss and a directed verdict were involved in *Radovich* v. *National Football League,* 352 U.S. 445 (1957), and *Continental Ore Company* v. *Union Carbide Corp.,* 370 U.S. 690 (1962).

themselves[36] and the conduct of the plaintiffs. Proof of the plaintiffs' active participation which has made them *in pari delicto* came almost totally from their own uncontradicted testimony and their own undisputed conduct. There has been an "exhaustive discovery procedure" which had been "completed" on this issue (Pet. Cert. 29, n. 49); the plaintiffs had produced all relevant documents (over 350,000 of them), answered extensive written interrogatories and provided 1605 pages of deposition testimony. The proof could come from no better source.

If the summary of the testimony of the individual plaintiffs in defendants' trial court Appendix (A 73-105) were an inaccurate or erroneous statement of the record, then plaintiffs should have availed themselves of the obligations and remedies of Rule 56 (e) and (f).[37] But plaintiffs filed no counteraffidavits. Instead, by means of a motion to strike after the summary judgment motion briefs were submitted, plaintiffs sought additional discovery on the *very limited* factual situation surrounding defendants' technical registration of the Midas trade and service marks (R 1343-54). By so responding to defendants' motion and

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[36] Plaintiffs have never claimed, "that any restriction was imposed by defendants other than those provided in the franchise agreements" (A 207) so that the contractual arrangement to which both parties agreed is the *sole basis* of petitioners' lawsuit and no genuine factual issue could be raised on this aspect.

[37] Paragraph (e) of Rule 56 provides for filing "depositions, answers to interrogatories, or further affidavits," while paragraph (f) permits continuances or other delays for the parties to obtain affidavits, further discovery or such other procedures as may be just (App. A).

supporting material, plaintiffs acknowledged that all of the material facts relating to *in pari delicto* were within the record and therefore accepted defendants' Appendix of the testimony and the Sherman affidavit as accurate and complete facts.

But petitioners now assert a "right to a decision on the merits" (PB 41) based upon counsel's allegations that factual disputes exist with respect to the "existence of legal coercion," "the existence of a conspiracy," and Pierce's termination (PB 42). Answering similar assertions below, the district court pointed out that the "depositions of the individual plaintiffs, quoted from in defendants' brief" were "uncontroverted except by counsels' arguments" (A 110). If there were *evidence* to justify a trial, plaintiffs should readily be able to, and in fact must, set forth those portions of the record which the courts below failed to consider and which demonstrate the error. Likewise, plaintiffs should readily be able to demonstrate *from the record*, that plaintiffs were "coerced" into accepting their initial and the many subsequent Midas franchise agreements, that defendants were not a single integrated business entity, and that Pierce did not write DX 56 (A 172) assuring Midas of his willingness "to cooperate fully" in his termination. The absence of any such record citations is ample proof that the courts below were correct in holding that "no genuine factual controversy exists . . . ." and that summary judgment was entirely proper in this case.

CONCLUSION

For the reasons set forth above the decision of the court of appeals should be affirmed.

Respectfully submitted,

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Dated: April 1968

APPENDIX A

The pertinent provisions of Rule 56 of the Federal Rules of Civil Procedure concerning summary judgment are as follows:

"(c) Motion and Proceedings Thereon. . . . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

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"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. *When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but, his response, by affidavits or as otherwise provided in this rule, must set forth specific facts* showing that there is a genuine issue for trial. *If he does not so respond, summary judgment, if appropriate, shall be entered against him.*

"(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

APPENDIX B

Pl X #1 id 4-17-61 CP

MIDAS, INC. FRANCHISE

AGREEMENT made at Chicago, Illinois, as of .... between MIDAS, INC., an Illinois corporation (herein called "MIDAS"), and .... (herein called "SHOP OWNER").

Midas is engaged in the business of selling at wholesale automotive exhaust system parts in connection with (a) its trade name, trademark and service mark "MIDAS", (b) marks which include the word "MIDAS", (c) the design of signs employed in authorized shops, as well as (d) certain other marks of Midas — (all of which are herein called "Proprietary Marks").* These products are sold and installed only by authorized "MIDAS" shop owners operating specialty automotive exhaust system installation shops known as "MIDAS MUFFLER SHOPS". Through advertising, merchandising and selling these products, and promoting the services in selling and installing them, Midas has built up a valuable good will in its products and services, the word "MIDAS", and the Proprietary Marks. The success of Midas and of all authorized "MIDAS" shop owners depends upon the continuation of this good will and upon the continued marketing of a fine product, adherence to the highest standards of business conduct on the part of Midas and all authorized shop owners, and the maintenance by the shop owners of prompt, efficient, satisfactory and courteous service to the public.

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*Some of the Proprietary Marks are registered in the United States Patent Office under Nos. 620322, 641711, 651091, 651747, 655353, 657036, 657037, 657051, 657128, 657604, 661021, 661321, 661827, 673083, 674939, 678396, 681974; additional applications for registration are pending.

In order to assist the authorized "MIDAS" shop owners to get started in business and to achieve maximum results, Midas makes available to all shop owners advice, information, experience, guidance and know-how with respect to management, financing, merchandising and service in the "MIDAS MUFFLER SHOPS", and Midas employs various other means to assist the authorized "MIDAS" shop owners to achieve success in their businesses.

In order for Midas and the authorized "MIDAS" shop owners to obtain the maximum benefits from the Midas advertising, good will and merchandising techniques, it is essential that each shop owner possess the qualifications, personnel, facilities and capital requisite to cultivating and developing the market to its full potential in his locality, and each shop owner must assume and carry out the obligation and responsibility for thus cultivating and developing the market. In this connection, Midas has entered into this Agreement in reliance upon, and in recognition of, the fact that .... will have the full managerial responsibility and authority for the management and operation of the Shop Owner's business.

IN CONSIDERATION of the foregoing and of the mutual agreements contained herein, Midas and Shop Owner agree as follows:

1. *License.* So long and only so long as this Agreement shall remain in force, Midas grants to Shop Owner, as an authorized "MIDAS" shop owner, the non-transferable right and license to market and sell at retail, when installed in patron's vehicle by Shop Owner, Midas' automotive exhaust system parts bearing the Proprietary Marks, purchased by Shop Owner from Midas, and to use the Proprietary Marks for services in connection therewith, at the following location: ....

2. *Agreements of Shop Owner With Respect to Midas' Name and Proprietary Marks.* (a) Shop Owner hereby acknowledges the validity of the Proprietary Marks and also acknowledges that the same are the property of Midas. Shop Owner shall not in any way do anything to infringe upon, harm or contest the rights of Midas in the Proprietary Marks or in any other mark or name which incorporates the name "MIDAS". Shop Owner shall not use any mark or name other than as herein licensed in connection with the sale of genuine Midas automotive exhaust system parts. Shop Owner shall not place any name or mark, other than the names or marks originally appearing thereon, on any products or packages or other materials which Shop Owner obtains from Midas.

(b) Shop Owner shall not use the word "MIDAS" in its firm name or corporate name without having obtained the prior written approval of Midas; and, if such approval is granted, Shop Owner shall, upon the request of Midas at any time, promptly discontinue the use of the word "MIDAS" (or any similar word) in Shop Owner's firm name or corporate name and shall promptly take such steps as may be necessary or appropriate in the opinion of Midas to eliminate the word "MIDAS" from Shop Owner's firm name or corporate name.

(c) Shop Owner recognizes that the use by him of any of the Proprietary Marks, or of any other mark or name that incorporates the word "MIDAS", inures to the benefit of Midas and that any good will arising from such use by Shop Owner shall revert to Midas in the event this Agreement is terminated for any reason.

3. *Agreements of Shop Owner With Respect to Operation of Shop.* (a) Shop Owner may operate his shop under the designation "MIDAS MUFFLER SHOPS".

(b) Shop Owner shall abide by all lawful and reasonable policies and regulations issued from time to time by Midas in connection with the operation of the shop and all other matters arising under this Agreement.

(c) Shop Owner shall furnish Midas with such statements, certificates, reports or other documents, pertaining to the operation of Shop Owner's shop and Shop Owner's compliance with the terms of this Agreement and the rules and regulations thereunder as Midas may from time to time request.

(d) Midas shall have the right, at reasonable times, to visit the shop for the purpose of inspecting the merchandise and equipment on hand, taking inventories, inspecting the nature and quality of goods sold and services rendered and the manner and method of operating the shop; in the event any of Shop Owner's inventory or business is located outside of the shop premises, Midas shall have similar rights wtih regard to the same.

4. *Warranties and Guarantees.* (a) There are no warranties, expressed or implied, made by Midas of the products sold under this Agreement other than the "Guarantee" which in printed form is furnished to the customer with each automotive muffler, and which "Guarantee" is made to the customer and not to Shop Owner. Shop Owner shall make no warranties or guarantees other than those contained in the "Guarantee".

(b) Shop Owner shall honor each "Guarantee" presented by a customer at Shop Owner's store in accordance with the terms thereof, irrespective of whether the muffler was purchased at that shop or from any other authorized Midas Muffler Shop.

(c) Shop Owner shall comply at all times with Midas' policies then in force and effect concerning the Midas "Guarantee" program. Midas will honor for credit all acceptable guarantees with return of muffler plates, as currently allowed by Midas.

(d) After the termination of this Agreement, Shop Owner shall not, except at Shop Owner's own expense and without right of reimbursement from Midas, honor any "Guarantee". In order that each "Guarantee" that is issued is certain of being honored pursuant to its terms, Midas agrees that every "Guarantee" issued to Shop Owner's customers during the term of this Agreement shall be honored by Midas or by an authorized "MIDAS" shop owner.

(e) Shop Owner agrees to pay all invoices from Midas promptly according to their terms, without any set-off or other claim for replaced mufflers returned under the guarantee program, except to the extent that written credit memorandum has been issued therefor by Midas prior to the due date of outstanding invoices. If, after such payment is made, Shop Owner shall become entitled to any credit, as herein provided, for any returned mufflers, Midas agrees to credit the same against any future payments owing from Shop Owner or to reimburse Shop Owner promptly if Shop Owner is not then indebted to Midas and has no orders pending.

Shop Owner hereby waives any and all right of set-off or reimbursement or any other claims of any kind whatsoever against Midas by reason of Shop Owner having sold or installed any mufflers under said guarantees, except to the extent that Shop Owner may have replaced such mufflers and returned the original mufflers or muffler plates together with matching guarantee certificates to Midas and

written credit memorandum for the amount allowed has been issued by Midas to Shop Owner as hereinabove provided; reserving to Shop Owner his other rights as hereinabove provided.

5. *Shop Owner Not Agent of Midas.* This Agreement does not in any way create the relationship of principal and agent between Midas and Shop Owner, and in no circumstances shall Shop Owner be considered the agent of Midas. Shop Owner shall not act or attempt to act, or represent himself, directly or by implication, as agent of Midas or in any manner assume or create or attempt to assume or create any obligation on behalf or in the name of Midas, nor shall Shop Owner act or represent himself as an affiliate of any other authorized "MIDAS" shop owner.

6. *Termination.* (a) This Agreement may be terminated at any time without cause at the will of either party by notice to the other party given not less than thirty days prior to the termination date.

(b) Upon the termination of this Agreement for any reason, Shop Owner shall cease to be an authorized "MIDAS" shop owner and shall (i) promptly pay Midas all sums owing from Shop Owner to Midas without set-off or other claim for replacement of mufflers under the guarantee program except as hereinabove provided, (ii) immediately and permanently discontinue the use of the Proprietary Marks, the designation "MIDAS MUFFLER SHOPS", all similar names and marks, and any name or mark containing the designation "MIDAS", or any other designation indicating or tending to indicate that Shop Owner is an authorized "MIDAS" shop owner, (iii) immediately and permanently remove at Shop Owner's expense all signs containing the Proprietary Marks, the des-

ignation "MIDAS MUFFLER SHOPS", all similar names or marks, any name or mark containing the designation "MIDAS", or any other designation indicating or tending to indicate that Shop Owner is an authorized "MIDAS" shop owner, (iv) promptly destroy, or surrender to Midas, all stationery, letterheads, forms, printed matter and advertising containing the Proprietary Marks, the designation "MIDAS MUFFLER SHOPS", all similar names or marks, any name or mark containing the designation "MIDAS", or any other designation indicating or tending to indicate that Shop Owner is an authorized "MIDAS" shop owner, (v) immediately and permanently discontinue all advertising as an authorized "MIDAS" shop owner, (vi) promptly transfer to Midas, or at Midas' direction, each telephone number listed by Shop Owner under the designation "MIDAS", "MIDAS MUFFLER SHOPS", or any similar designation, and execute such instruments and take such steps as in the opinion of Midas may be necessary or appropriate to transfer each such telephone number, (vii) immediately and permanently discontinue the use of the word "MIDAS" in Shop Owner's firm name, corporate name or trade name and take such steps as may be necessary or appropriate in the opinion of Midas to change such names to eliminate the word "MIDAS" therefrom, (viii) sell all inventories on hand to Midas, at Midas' request, at the price then being charged by Midas to authorized "MIDAS" shop owners less freight and handling costs, and (ix) thereafter refrain from doing anything that would indicate that Shop Owner is or ever was an authorized "MIDAS" shop owner.

(c) Shop Owner agrees that an action at law for breach of contract would be an inadequate remedy for Shop Owner's breach of or failure to perform any of his obligations under the foregoing paragraph 6(b) hereof, and

that, in the event of any such breach or failure to perform, Midas shall be entitled to relief in an action in equity to restrain the continuation by Shop Owner of any such breach and to compel Shop Owner to perform such obligations. Neither the foregoing remedy nor any other remedy exercised by Midas shall be deemed exclusive, but Midas shall be entitled cumulatively to exercise any and all remedies available in law or in equity, and its exercise of any one right or remedy shall not preclude it from exercising any other right or remedy. No waiver by Midas of any violation of any provision of this agreement shall constitute a waiver of any further violations nor a waiver of any other provision of this agreement.

7. *General Provisions.* (a) Shop Owner acknowledges that no representation or statement has been made to him in behalf of Midas that in any way tends to change or modify any of the terms of this Agreement or that in any manner prevents this Agreement from becoming effective and further acknowledges that there is no other agreement or understanding, either oral or in writing, between the parties affecting this Agreement or relating to the subject matter hereof, except with regard to policies in force and effect from time to time concerning the Midas "Guarantee" program, and except with respect to any agreement or understanding which has been reduced to writing and signed by the parties.

(b) If any Midas trademarked merchandise or equipment in the possession of Shop Owner at any time is levied upon or seized by any court officer, receiver, trustee in bankruptcy, assignee for benefit of creditors, or by any landlord or other person, or if said Midas trademarked merchandise shall have come into the possession of any other person other than in the usual course of Shop Own-

er's business, Shop Owner hereby agrees that Midas shall have the right, if permitted by the law governing the same, to repossess such Midas trademarked merchandise or equipment upon depositing with such person then having custody or possession thereof, an amount equal to Shop Owner's cost price thereof as shown on Midas invoices, which amount shall be held by such person in lieu of such trademarked merchandise or equipment. Shop Owner further agrees to execute any further documents and perform any further acts which may be required by law for carrying out this provision.

(c) This Agreement terminates and supersedes all prior Midas, Inc. license and sales agreements, if any, between the parties hereto, except that this Agreement shall not operate to cancel any of Shop Owner's orders placed with Midas pursuant to the provisions of any license and sales agreement terminated and superseded hereby, or impair or affect any existing obligation of Shop Owner to Midas.

(d) This Agreement shall inure to the benefit of the successors and assigns of Midas. The interest of the Shop Owner in this Agreement is personal and shall not be assigned, transferred, shared or divided in any manner by the Shop Owner, and, if Shop Owner is a corporation, the shares of stock of Shop Owner shall not be sold, pledged, hypothecated, assigned or transferred so as to change the controlling interest therein without the prior written consent of Midas.

(e) In the event any provision of this Agreement shall be determined to be invalid or unenforceable and prohibited by the laws of the State or place where it is to be performed, this Agreement shall be considered divisible as to such provision, and such provision shall be inoperative and shall not be part of the consideration moving from

either party to the other, and the remaining provisions of this Agreement shall be valid and binding and of like effect as though such provision were not included herein.

(f) Any notice required or permitted by this Agreement, or given in connection herewith, shall be in writing and may be by personal delivery or by first-class certified mail, postage prepaid. Notices to Midas shall be delivered to or directed to Midas, Inc., 4101 West 42nd Place, Chicago 32, Illinois. Notices to Shop Owner shall be delivered to any person designated in this Agreement as having full managerial authority and responsibility for the operating management of Shop Owner or directed to Shop Owner at Shop Owner's principal place of business as described in paragraph 1 hereof.

(g) The parties intend this Agreement to be executed as an Illinois agreement and to be construed in accordance with the laws of the State of Illinois.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the date first above written.

Attest: MIDAS, INC.

.... By ....

Secretary President or Vice President

Attest:

...., Shop Owner

Secretary

By ....

By ....

No. 733

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

PERMA LIFE MUFFLERS, INC.
PERMA LIFE MUFFLERS OF ARLINGTON, INC.
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.
PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.
ROBIN HOOD OF GRAND RAPIDS, INC.
ROBIN HOOD OF MUSKEGON, INC.
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a
ROBIN HOOD MUFFLER SHOP
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a
MIDAS MUFFLER SHOP OF BATTLE CREEK
CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS
PIERCE MUFFLER SHOPS, INC.

PETITIONERS

v.

INTERNATIONAL PARTS CORPORATION
MIDAS, INC.
POWELL MUFFLER CO. INC.
MUFFLER CORPORATION OF AMERICA
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,
ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

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MISCELLANEOUS

I

RESPONDENTS' PARI DELICTO ARGUMENTS ARE BASED UPON A DISTORTED AND OFTEN ERRONEOUS REPRESENTATION OF THE RECORD AS WELL AS AN ERRONEOUS ANALYSIS OF THIS COURT'S DECISIONS

[This Section discusses material in respondents' brief, pp. 29-57]

Respondents have tried to force the facts to fit their erroneous legal theory that this Court has "recognized" [Respondents' Brief, hereinafter recited as "RB" 35] the *in pari delicto* doctrine "to bar recovery in actions brought to recover treble damages under the antitrust laws" [RB 32] where the treble-damage claimants were co-participants in an illegal endeavor. By editing the record with quotations out of context, partial quotations which are wholly misleading and statements unsupported or actually refuted by the record, respondents have attempted to create the impression that petitioners, together with respondents, were responsible for formulating and initiating the MIDAS franchise program and the MIDAS franchise agreement[1]. The record will not support this construction. Respondents and respondents alone, without any assistance at all from petitioners, originated, formulated, promulgated, initiated and developed the MIDAS

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[1] At various points in their brief respondents had charged that petitioners "helped to formulate the new Midas plan for merchandising automotive exhaust systems" [RB 2, Questions Presented]; "pioneered with MIDAS in evolving its concepts" [RB 8]; "discussed and voted upon policies concerning the alleged illegal restrictions with respect to resale price maintenance, wholesale sales, and the sale of shocks and springs or other similar items" [RB 11]; "participated in the formation and development of franchise policies" [RB 26]; "voluntarily joined with [respondents] in the initiation of this franchise program" [RB 29]; "helped formulate the program" [RB 48]; "participat[ed] in and vot[ed] upon the formulation of franchise policies" [RB 50]; "fostered, and helped to formulate [the] very restraints" [RB 53]; aided "in the formation of . . . the scheme" [RB 57]; and accused petitioners of being "joint venturer[s]" with respondents "in an alleged illegal arrangement" [RB 57].

program, the MIDAS franchise system, and the MIDAS franchise agreement.

A. Respondents Have Misstated the Record in Alleging that Petitioners Were Co-initiators and Co-formulators of the Midas Franchise Program and Agreement.

Respondents' unfounded, but often repeated assertions that petitioners were co-initiators or co-formulators of the MIDAS program, the MIDAS franchise system and the MIDAS franchise agreement have no basis in the record. Indeed, the record which the respondents previously made in the District Court conflicts directly and totally with the assertions which the respondents now make.

The plain facts are that the respondent International Parts, Inc., and Nathan and Gordon Sherman who were its controlling stockholders, initiated the concept of MIDAS, its form of franchise agreement, and its method of operation before petitioners became MIDAS franchisees and that the petitioners played no part in this formulation. For example, according to an affidavit [Appendix, hereinafter "A" 64-72] which the respondents filed in the District Court, Gordon and Nathan Sherman "organized MIDAS, Inc." as a wholly owned subsidiary of International Parts Corporation in 1955 [A 67]. International Parts, which the Shermans controlled, was in the business of distributing automotive replacement parts "primarily exhaust system parts, i.e. mufflers, tailpipes, exhaust pipes" [A 65]. It was organized in 1938. International Parts, according to the affidavit, "decided" that through MIDAS it would franchise outlets to which it would sell exhaust system parts rather than extend its business operations into the retail area by direct ownership and management [A 67]. To achieve this purpose International Parts "decided upon an overall promotional concept" which included brand identification, a unique coast to coast lifetime guarantee, free installation, 15-minute service and a large national advertising program [A 68-69]. To "insure" that

participating franchisees "performed in accordance with the MIDAS image" each franchisee "signed" a License and Sales Agreement [A 70]. The sworn deposition testimony of Gordon Sherman shows that respondents, and respondents alone were responsible for the franchise agreement and the ideas contained in it [Sherman Dep. 27-29]:

"Q. Did you discuss with anyone the drafting and formation of the agreement, which is that which appears in Appendix A of the Answer in this cause [Respondents' first franchise Agreement]?
A. I believe that I did.

Q. With whom do you believe you discussed that?
A. Mr. Silbert [Respondents' attorney].

Q. And with your father?
A. I don't remember.

Q. Was the agreement an idea of yours?
A. I don't understand the question.

Q. I mean was the preparation and the idea of entering such franchise agreement an idea which you had?
A. I am still not quite sure what you mean.

* * *

Q. Was the idea of setting up MIDAS, Inc. in franchise agreement form, executing franchise agreements with various dealers at the retail level thoughout the country your idea?
A. Mostly.

Q. And it was discussed with Mr. Silbert in the formation and drafting of the agreement, is that correct?
A. Yes.

Q. Was the idea in broad terms discussed by you also with your father?
A. Yes.

Q. Was it discussed by you with anyone else?
A. Perhaps.

Q. I mean in the company, in International Parts Corporation.

A. Perhaps.

Q. Do you recall with whom?

A. No, I don't.

Q. You have no recollection then of any specific persons with whom you discussed it except Mr. Silbert and your father?

A. That's right."

To avoid the plain meaning of these facts respondents emphasize the activities of the National Advisory Council which they created in March of 1957 [RB 9-11, 50, 64] some sixteen months after respondents promulgated and entered into their first franchise agreements [December, 1955] which then contained the exclusive dealing, tying and price-fixing provisions which are the subject of petitioners' complaint. The Council was composed of ten of respondents' franchisees. Each of the petitioners served on the Council at one time or another between 1957-1960. The Council did not hold its first meeting until October 1957 [RB 9] more than sixteen months after any of the petitioners entered into his first franchise agreement. Respondents allege that petitioners, as members of the National Advisory Council, "voted upon policies concerning the alleged illegal restrictions [of which they complain]" namely, resale price maintenance, wholesale sales and the sale of shocks and springs and other similar items [RB 11]. According to the Respondents, "policy decisions" involving the "Midas concept" were the joint product of petitioners and respondents and not the respondents alone [RB 10].

Respondents' assertions ignore the record. They quote parts of petitioner Ross's depositon at pages 284 through 287 to describe the "function of the National Advisory Council and reach the conclusion that policy decisions were made by petitioners and respondents "working together" and "not made" by the respondents "alone" [RB 10]. Respondents, however, conveniently omit and completely ignore Ross's testimony at the intervening pages 285-286:

"Q. Is it a fact, Mr. Ross, that the function of the council was to decide what you have previously described as Midas policy?

A. The National Advisory Council never formed policy, never. This was a prerogative always exercised by the powers that be within the Midas organization."[2]

Respondents' assertions that the National Advisory Council "voted upon" policies concerning illegal restrictions [RB 11] are not even supported by the record references which they cite. Ross's deposition [pages 296 and 297] shows nothing more than a "pro and con" discussion of resale price maintenance. His testimony with regard to wholesaling [290] which is also cited by the respondents is to the same effect. Ross's testimony with regard to respondents' restrictions on the sale of shock absorbers [294-295] is typical and also to the same effect. The National Advisory Council did not "vote upon" a ban on the sale of shock absorbers [294-295]:

"Q. The contract, the License and Sales Agreement, for example did you ever bring up at a general meeting the problem of selling only Midas?

* * *

A. Now, that is rather ambiguous. I think what you are trying to ask me – let's see if I am right. When you say 'only Midas' are you referring to the Midas mufflers, tail pipes, and exhaust pipes, or are you talking about related items?

Q. Including merchandise other than MIDAS.

A. Yes, this was brought up in the general area of around 1957, late 1957, early 1958 and prior to that time.

I had testified previously that I had talked with Nate and Gordon Sherman –

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[2]Ross testified that the National Advisory Council's powers were limited to making *suggestions* to respondents and that the Council had, from time to time, made some suggestions. None of these involved unlawful restraints.

Q. These are private conversations?

A. Yes I am leading up to that.

Other dealers became aware of the fact that somewhere in the program there was knowledge of other Midas installation shops selling shocks and brakes and this got to be of quite some concern to a number of us, I particularly, because this is something I wanted long ago.

Yet I heard through the group within, not specifically, that there were certain operators installing shocks. I wanted it. I was for it, and there were other dealers either at the regional meeting that we had in St. Louis or in Ashville who discussed it.

We were told this thing was being thought about at headquarters, but as of right now, the answer was 'no'." [Ross Dep. 294-295][3]

Ross's testimony about the activities of the National Advisory Council is corroborated by the testimony of the petitioner Pierce. [Pierce Dep. 171-173] See *infra,* section II D at 35.

Respondents' assertions that petitioners were somehow responsible for the unlawful provisions in the franchise agreement is pure legerdemain. These provisions, as the record well shows, were originated by the respondents with-

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[3]Respondents' reference to a vote by the National Advisory Council to discontinue "wholesaling" is equally misleading. Respondents suggest that Ross testified to this fact [RB 11]. In their brief they imply that they are quoting Ross. Ross did not testify to this assertion at all. The language which respondents quoted in the Brief is part of a question asked by counsel for respondents of Ross; it is not Ross's testimony:

> "Q. Isn't it a fact that it **was the consensus of the National Advisory Council at that meeting that wholesaling should be discontinued?**
>
> "A. Possibly, but that doesn't necessarily mean that I would have to agree." [Ross Dep. 290]

The quotation which the respondents attribute to Ross is in bold face type in the colloquy above. It is Hornbook law that the questions of counsel, particularly adverse counsel, cannot be evidence.

out any help at all from any of the petitioners. The provisions were promulgated by respondents in a preprinted franchise agreement form in 1955 and then offered to each of the petitioners. The provisions preceded the petitioners in the program and not the other way around as respondents imply. Except for description of the location, all of the franchises were absolutely identical. Petitioners had nothing to do with formulating the terms of the franchise agreement, its exclusive dealing, tying, and price-fixing provisions, or its restraints on alienation. Petitioners were not co-initiators, co-formulators, or co-promulgators of the MIDAS franchise, the MIDAS system or the MIDAS franchise agreement. They merely accepted the franchise agreement in order to obtain the right to purchase and sell respondents' MIDAS muffler which offered brand identification, and national advertising which featured 15-minute service, free installation, and a "unique" [RB 8, 48] coast to coast lifetime guarantee.

B. The Unlawful Restraints in the Franchise Agreements Are Not Reasonably Ancillary to the Midas Franchise Concept.

Respondents have distorted the nature of the petitioners' complaint as well as the record. They construe the complaint as a broad attack upon their entire franchise system[4] and argue that the franchise agreement "must be viewed as a whole and in its entire context" and not in its separate unrelated pieces [RB 47]. This construction and argument are unsound as a matter of fact as well as law.

Petitioners do not now and never have challenged respondents' franchise system *per se*. The system itself is not unlaw-

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[4]Respondents for example refer to their "allegedly illegal and restrictive program" [RB 2, counter statement of questions]; their assumption for the purpose of their motion for summary judgment that their "franchise arrangement was illegal" [RB 6]; the franchise "now claimed to be illegal" [RB 16, 24]; the "allegedly illegal system of distribution" [RB 24]; the "allegedly illegal program" [RB 26]; and so on. See also RB 29, 51, 52.

ful *per se*, notwithstanding respondents' "assumptions" [e.g. RB 8] to the contrary. The thrust of petitioners' complaint is addressed to only those provisions of the franchise agreement and program practices which were illegal: namely, the price-fixing and exclusive dealing and tying provisions and practices which restricted the persons to whom and the territories in which franchisees could sell merchandise which they had purchased from respondents. None of these unlawful provisions were essential to the MIDAS system which was based upon (1) muffler brand identity through the trade-mark MIDAS; (2) a "unique" coast to coast lifetime muffler guarantee, (3) 15-minute service, (4) free installation and (5) a large national advertising program. There was nothing inherently unlawful about this system. The vice of the respondents' arrangement was its use of this system to expand its business through a variety of unlawful restraints which included price fixing, exclusive dealing, and tying restraints as well as restraints upon alienation.

The antitrust laws do not authorize exemptions for franchisors or the imposition of exclusive dealing, tying and price fixing arrangements or restraints upon alienation through the use of franchise agreements. *Goodyear Tire and Rubber Co. v. FTC*, 331 F.2d 394, 401 (C.A. 7, 1964), aff'd, 381 U.S. 357, 85 S. Ct. 1498 (1965); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856 (1967). Such restraints are illegal in and of themselves. They need not be coercively induced. *Sun Oil Company v. FTC*, 350 F.2d 624, 636 (C.A. 7, 1965), cert. denied, 382 U.S. 982, 86 S. Ct. 559 (1966). Here petitioners imposed such restrictions as the only basis on which they would do business. Petitioners accepted the restrictions in order to acquire the right to purchase and sell the MIDAS muffler which carried a "unique" coast to coast lifetime guarantee as well as extensive national advertising and not in any effort to assist, help or cooperate with respondents in violating the antitrust laws [A 138-140]. *Bales v. Kansas City Star*, 336 F.2d 439 (C.A. 8, 1964). They adhered to the restraints to retain the right

to purchase and sell the MIDAS muffler. The franchise was cancellable on thirty days notice [A 44]. Moreover respondents enforced the restraints through the use of subtle and sophisticated techniques ranging from covert threats of franchise termination to full blown termination where threats proved ineffective [e.g. A 175-201]. See *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960), cert. denied, 366 U.S. 963, 81 S. Ct. 1924 (1961), Second Opinion 324 F.2d 566 (C.A. 4, 1963). See *infra,* Section II, at page 22.

Respondents' attempts to justify the unlawful restrictions in their franchise agreements as reasonably ancillary to legitimate business objectives are unavailing. Petitioners did not seek the restraints of which they complain. Such restraints were a part of the MIDAS program before petitioners accepted their first franchise agreements. Moreover, petitioners did not "foster" or enjoy the "fruits" of an "alleged illegal system" [RB 52]. Respondents' repeated references [RB 13 and 52] to petitioners' profits as MIDAS franchisees only confuses the issue; they ignore the fact that petitioners earned profits as MIDAS franchisees *in spite of and not from or because of* the illegal restrictions. Sales generated as a result of petitioners' own efforts, which included a considerable volume of local advertising[5] coupled with national advertising which featured the MIDAS muffler, a "unique" coast to coast lifetime muffler guarantee, and prompt, efficient, free, 15-minute installation, produced petitioners' profits. The unlawful restrictions severely reduced the extent of these profits [A 151, 155]. Respondents' overall argument that petitioners did not and could not have suffered injury because they profited from the "program" is completely false. Cf. *Utah Pie v. Continental Packing Co.,* 386 U.S. 685; 87 S.Ct. 1326 (1967).

Petitioners were "injured" in their businesses as a direct result of the unlawful restraints which the respondents

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[5] Ross alone in vested over $129,000 in local advertising while a MIDAS franchisee [R 907]; Petitioner Pierce invested $150,000 in local advertising during the same period [A 130]. Collectively the cost of petitioners' local advertising exceeded $400,000.

imposed. The price-fixing restraings were illegal *per se*. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S. Ct. 503 (1960). In spite of this or perhaps because of this respondents contend that petitioners benefited from resale price maintenance since "they were free to maintain higher prices" [RB 49]. As a further justification respondents assert that resale price maintenance was necessary to "avoid any conflict with the national image" which MIDAS sought to create [RB 48]. Both of these contentions are without merit and ignore the record.

Petitioner Ross testified that he was unable to compete with a competitor who sold another of respondents' mufflers, the International brand, because of respondents' resale price policies. The competitor, he said, advertised the International Brand muffler as the "same" as the MIDAS muffler with the "same guarantee" and sold it at prices which were below prices which respondents fixed for their MIDAS muffler [A 55, 137; Ross Dep. 211, 101]. Petitioner Skarupa testified similarly [Skarupa Dep. 294]. Respondents can point to nothing in the record which refutes these facts. Moreover there is nothing in the record to support respondents' unfounded assertion that petitioners benefited because they were "free to maintain higher prices."

Respondents' contention that resale price maintenance was necessary to "avoid any conflict with the national image" is subject to even more serious legal defects. This argument assumes erroneously that all of the parts which respondents "sold" their franchisees bore the MIDAS trademark together with the equally erroneous assumption that all MIDAS franchisees operated in fair trade states. Both assumptions are wrong.

The record shows that tailpipes, exhaust pipes, hollywood mufflers, and indeed all exhaust system parts other than the MIDAS muffler which MIDAS sold its franchisees bore no trademark, MIDAS or otherwise [A 220-222 and references

cited therein[6]]. Respondents' trademark registrations [A 106 and 107] do not aid them. Through these registrations "covered" [RB 58] tailpipes, exhaust pipes, and clamps, they did not cover the tailpipes, exhaust pipes and clamps which respondents sold to petitioners. The record shows that respondents did not use these trademarks on tailpipes, exhaust pipes and kindred items which they sold petitioners A 221-222]. Respondents used the mark on the muffler and the muffler alone.

One of the petitioners herein, Claude Wheeler, operated MIDAS muffler shops in the free trade State of Missouri. This state had no fair trade law exempting vendors from the provisions of Section 1 of the Sherman Act. Additionally a review of respondents' response to petitioners' subpoena duces tecum dated November 22, 1960 shows that a number of the respondents' franchisees were doing business in states which had no so-called fair trade laws.

Respondents do not even seriously attempt to justify the exclusive dealing and tying provisions in their franchise. They could not do so even if they tried. The provision had no redeeming virtue. Petitioners were required to pay more for exhaust system parts (other than MIDAS mufflers which were trademarked and available only from respondents) which they purchased from respondents than they would have paid had they been free to purchase the same parts from respondents' competitors [A 185-189]. It is difficult to imagine how petitioners could have profited, benefited or

---

[6]Gordon Sherman admitted in his deposition that respondents did not place a trademark on exhaust pipes, tailpipes and muffler clamps [A 163]. This was corroborated by respondents' witness Schroeder [A 166]:

> "Q. Was the name Midas placed upon any of these items by putting the item in a box with a Midas name on it or by attaching a tag with a piece of wire or string during any of the period 1955 through and including 1960?
>
> "A. Not to my knowledge."

To the same effect see the testimony of petitioners Ross and Skarupa [A 221 and 222]; see *infra,* section IIC(2) at page 31.

even enjoyed the "fruits" of this restraint. Moreover, the record shows that the petitioners consistently objected to this restraint [A 54, 56-57, 61] and that respondents just as consistently enforced the restraint, advising its field counsellors that it was "essential to participation in the Midas program" that franchisees not buy from Texas Tailpipe Company [A 189]; that to purchase from outside sources was a "felony," indeed a "capital offense," that field counsellors could not "work with a dealer if this kind of thing prevailed" [A 192]; and that it was time to "enforce" respondents' exclusive dealing policies [A 182].

Respondents' prohibition of the practice of "wholesaling" [A 178, 181] constituted an unlawful restraint on alienation as well as an unlawful resale price maintenance restraint. Petitioners were denied an entire market and suffered consequent injury in losses of profits from sales as a result of this restriction.

The antitrust laws do not authorize restraints of the foregoing character. These restraints are not exempt from the provisions of the antitrust laws, merely because they are incident to some other purpose, such as a franchise program, which is itself lawful.

C. Simpson v. Union Oil of California Controls the Case at Bar.

Respondents' analysis of this Court's decisions are misleading and inaccurate. Those decisions do not give substance to the theory which the respondents seek to sustain.

Respondents' assertion that "this court" has "recognized" [RB 35] and "consistently applied" the "*in pari delicto* doctrine" in private treble damage actions [RB 29] is not correct. To the best knowledge of the petitioners this Court has never upheld the defense of *in pari delicto* in any private antitrust case which it has decided. 78 Harv. L. Rev. 1241, 1244 (1965), "In Pari Delicto and Consent as Defenses in Private Antitrust Suits."

To support this naked assertion respondents cite one case decided by this Court, *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377, 47 S. Ct. 400, 405 (1927). Respondents assert that in this case the Court "approved" [RB 3, 5] a District Court instruction that if the plaintiff was *in pari delicto*, the plaintiff "could not recover any damages whatsoever on account of defendant's refusal to continue to sell it goods" [RB 35]. A careful reading of this Court's opinion shows that this Court did not "approve" this instruction.

The language from this Court's opinion which respondents quote [RB 35] represents nothing more than this Court's resume of a jury instruction given by the District Court. In other words, the language quoted by respondents in their brief from *Eastman Kodak Co.*, supra, is in fact part of this Court's statement of the facts in that case. The quoted language does not represent this Court's "approval" of the instruction or an application by this Court of the "*in pari delicto*" doctrine.

Southern Photo had won an award of treble damages under Section 7 of the Sherman Act. The Court of Appeals affirmed. Eastman asked this Court to review the decision. It challenged the competency of the proof offered by Southern, as a measure of Southern's damage. John W. Davis, Eastman's attorney, argued that Southern could not use the profits it earned as Eastman's customer to measure its losses for the period after Eastman refused to continue dealing with Southern, alleging among other things that Southern had during the prior period participated with Eastman in an unlawful monopoly. Nonetheless this Court affirmed the jury's treble-damage verdict, stating that "under the circumstances of this case" there was nothing in the trial court's "instructions [one of which was of an in pari delicto nature] of which [*Eastman* could] justly complain." 273 U.S. at 377-378. This Court did not pass upon the validity of the district court's *in pari delicto* instruction. This Court affirmed the judgment that Southern had won below, in spite of–and not because of–this instruction.

Respondents' efforts to rely upon *Bishop v. American Preservers Co.*, 105 F.2d 845 (N.D. Ill. 1900) [RB 32]; *Northwestern Oil Co. v. Socony Vacuum Oil Co.*, 138 F.2d 967 (C.A. 7, 1943), cert. denied, 321 U.S. 792, 64 S. Ct. 790 (1944) [RB 45] and their attempts to distinguish [RB 43] *Ring v. Spina*, 148 F.2d 647, 653 (C.A. 2, 1945); *Enterprise Industries Inc. v. Texas Co.*, 136 F. Supp. 420 (D. Conn. 1955), rev'd on other grounds, 240 F.2d 457 (C.A. 2, 1956), cert denied, 353 U.S. 965, 77 S. Ct. 1049 (1957); *Red Rock Bottlers, Inc. v. Red Rock Cola Co.*, 1952 Trade Cases CCH ¶ 67,375 (N.D. Ga. 1952) [RB 47]; and *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960), cert. denied, 366 U.S. 963, 81 S. Ct. 1924 (1961); Second Opinion, 324 F.2d 566 (C.A. 4, 1963) are without merit.

Bishop, supra, and *Northwestern Oil Co.*, supra, are not directly in point. In *Bishop* the defense was an alternate ground for denying recovery since the court held that the injury came from an act of the defendant which was not unlawful. The *in pari delicto* statement in *Northwestern Oil Co.* was no more than dictum inasmuch as plaintiff was denied recovery for failure to prove damages.

Respondents cannot distinguish *Ring*, supra, *Enterprise*, supra, and *Red Rock*, supra, on the ground that the treble damage plaintiffs there were "victims" rather than "participants" since they entered into "the illegal arrangement not in the hope or expectation of gaining any benefit therefrom. . . ." [RB 43]. In those cases the treble damage plaintiffs had entered into agreements with the defendant with the *full expectation* of gaining "benefits" in spite of and not from or because of the illegal provisions in their agreement.

Red Rock Cola, supra, is almost precisely parallel to the case at bar. Indeed, the defendant there relied upon some of the same authorities that are relied upon by the respondents here: *Harriman v. Northern Securities Co.*, 197 U.S. 244, 25 S. Ct. 493 (1905) [RB 32] and *Northwestern Oil Co.*,

supra [RB 35]. The District Court reviewed these authorities and rejected the *in pari delicto* defense stating:

> "In the case here, the plaintiff was not in business, could not be coerced, and was organized and created for the purpose of engaging in business by reason of the rights granted under the contracts which contain the provisions now challenged, and did so operate for several years.
>
> "It is contended by the corporate defendants that this was such participation as placed plaintiff *in pari delicto*. However, it is neither contended or shown that the plaintiff derived any benefit from the challenged provisions of the contract or that it sought to have such provisions included therein.
>
> "*Since the provisions of the contract which are challenged benefit the corporate defendants, and restrict plaintiff, it is reasonable to assume that plaintiff submitted to rather than shared in the benefits from such provisions . . .*
>
> * * *
>
> "Here the provisions of the contracts which are challenged are for the benefit of the defendants. Plaintiff derived no benefit from acting under them, the provisions being restrictive in character they were of sole benefit to the corporate defendants.
>
> "Under the facts of this case the plaintiff does not stand *in pari delicto* with the corporate defendants. See *Ring v. Spina*, . . . 148 F.2d 647." [at 67,965, emphasis supplied].

Osborn v. Sinclair Refining Co., supra, cannot be distinguished on the ground that the dealer in that case had never "voluntarily signed or *entered into any agreement*" regarding the illegal restrictions of which he complained and therefore involved neither *in pari delicto* nor consent [RB 47]. This assertion is not true. In his opinion in that case Chief Judge Sobeloff carefully described the "agreement" which was the predicate for the litigation stating:

> "In the present case, it is clear from the findings of fact that Sinclair-Sherwood's conduct went beyond

> a mere announcement of policy and refusal to deal. As pointed out above, the findings compel the conclusion that there existed, in fact, an express agreement with this particular plaintiff to buy Goodyear TBA, made after the cancellation of his first lease in order for the plaintiff to be restored as a gasoline dealer. This case is not within the *Colgate* doctrine. Moreover, it is no distinction to say that *Parke, Davis* was concerned with price-fixing whereas here we have a tie-in. Both price-fixing and tie-ins affecting a not insubstantial amount of commerce, are illegal per se. . . ." [286 F.2d at 839]

The Fourth Circuit had previously held, in *McElhenney v. Western Auto Supply Co.*, 269 F.2d 332 (C.A. 4, 1959), that a franchise dealer could not state a cause of action under Section 3 of the Clayton Act if he was unable to show an agreement. In *McElhenney*, Chief Judge Sobeloff said:

> "The gravamen of a Section 3 violation is the forbidden condition, agreement or understanding of exclusivity, and a proper pleading should assert this ultimate fact. It makes no difference *whether this is voluntary or is imposed by coercion*, but without such agreement, condition or understanding, there can be no statutory infraction. It is only in the presence of this essential element that consideration must be given as to whether competition may be substantially lessened, or whether there is any tendency toward monopoly. . . ." [at 338-339, emphasis supplied]

Chief Judge Sobeloff's statement in *McElhenney*, supra, is extremely significant, particularly so, in light of respondents' misplaced reliance upon *Pennsylvania Water and Power Co. v. Consolidated Gas, Electric Light and Power Co.*, 209 F.2d 131 (C.A. 4, 1953), cert. denied, 347 U.S. 960, 74 S. Ct. 709 (1954) which, unlike the present case, involved litigation between co-conspirators.. Respondents ignore the fact that though the Fourth Circuit, relied upon the *in pari delicto* doctrine in *Pennsylvania Water*, supra, it nevertheless subsequently decided in favor of *Osborn* against Sinclair in a

treble-damage action under Section 4 of the Clayton Act (15 U.S.C. 15) which more nearly parallels the case at bar. Moreover, the dictum in *McElhenney*, supra, suggests that respondents' contention that "coercion" is essential to relieve an antitrust treble-damage plaintiff of the *pari delicto* onus is incorrect. It is additionally significant that Circuit Judge Soper who wrote the opinion in *Pennsylvania Water*, supra, also participated in the Fourth Circuit's decisions in both *Osborn* cases, as well as *McElhenney*, supra.

Respondents' assertions that *Simpson v. Union Oil Co. of California*, 377 U.S. 13, 84 S. Ct. 1051 (1964), reversing 311 F.2d 764 (C.A. 9, 1963) had "nothing to do with the defense of *in pari delicto*" [RB 46] is likewise incorrect. Respondents categorically, but erroneously state that "*in pari delicto*" was "not involved" [RB 44, 45] in *Simpson* and was not "considered" or "pased upon" either by "the lower courts" or by this Court [RB 44]. Respondents compound their error by implying that none of the briefs in *Simpson* argued the *in pari delicto* doctrine [RB 46].

In granting summary judgment to Union in *Simpson*, supra, the District Court "considered" the *in pari delicto* question and said:

> "The assumed illegality of the agreement could have afforded a defense if Union had sought to enforce the consignment contract, *Continental Wallpaper Co. v. Lewis Voight & Sons, Co.*, 212 U.S. 227, but it does not follow that plaintiff would have had any right to assert damages. Both the doctrine of *pari delicto* and *volenti non fit injuria* would afford an adequate defense to such a claim." [1961 Trade Cases, CCH ¶ 69,936 at 77,698 (1961)]

Thus, contrary to respondents' brief, the doctrine of in *pari delicto* was involved in *Simpson*, supra, and was "considered" by a lower court. Moreover, when *Simpson*, supra, reached this Court, both petitioner and respondent argued the *in pari delicto* question [Respondent's Brief in *Simpson v. Union Oil Co. of California*, No. 87, October 1963 Term, at 84-86; Petitioner's Brief, No. 87, October 1963 Term, at 46].

D. Respondents' Attempts To Apply the In Pari Delicto Doctrine Ignore the Record.

Respondents urge the Court to apply the *in pari delicto* doctrine to bar petitioners from proceeding under Section 4 of the Clayton Act because there is no evidence (according to respondents) to suggest that any of the petitioners were "coerced" to "enter into" their franchise agreements with respondents [RB 53]. To afford petitioners relief would, according to respondents, "defeat the very policies of the antitrust laws" which the petitioners purport to be "enforcing" and would "encourage persons to become active participants in illegal schemes knowing that if the schemes should work out disappointingly they would recover three times their alleged losses" [RB 56].

Respondents' theories are erroneous. The presence of "coercion" is not essential to vitiate the defense of *in pari delicto*. *McElhenney v. Western Auto*, supra [dictum]; *Simpson v. Union Oil Co. of California*, supra; see 78 Harv. L. Rev., supra. Furthermore, inherent in the respondents' theory, is the fallacious concept that once a franchisee "voluntarily" *enters into* an agreement which contains unlawful provisions, his franchisor may thereafter "enforce" the unlawful terms in that agreement without regard to the antitrust laws, including Section 4 of the Clayton Act. Section 4 cannot be read to permit this result. Moreover, we believe, contrary to respondents' assertions, that this Court has held that a "seller's unilateral offer of terms of sale, leaving the buyer free to accept or reject, amounts to coercion sufficient to vitiate *pari delicto* whether or not the seller states that the same terms will be offered to others if the buyer rejects" [RB 53]. See *Simpson v. Union Oil Co. of California*, supra, at 16. Compare 78 Harv. L. Rev. at 1246 (1965) "In Pari Delicto and Consent as Defenses in Antitrust Suits"[7].

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[7] "Explicit in the [*Simpson*] opinion is a judgment that the public aspects of the private action, which led the Court in

Coercion[8] in fact clearly existed in the case at bar. Respondents forced petitioner Pierce to accept his first franchise agreement. He did not seek respondents out to obtain their franchise and he did not accept his first franchise willingly or with alacrity [A 124]:

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earlier decisions to narrow the *in pari delicto* defense required this further narrowing. Most of those who had followed Union Oil's price schedules were required to comply with them as a condition of acquiring and keeping their franchise. Barring Simpson's recovery would have foreclosed all private suits, and would have limited potential sanctions against Union Oil to those that might be imposed in a Government sponsored action. The Court in Simpson however seemed to find some support for its holding in the private equities of the case. Mr. Justice Douglas repeatedly termed the agreement coercive. The decision therefore went beyond prior case law since the alternative available to Simpson—refusing to accept the illegal terms and thus failing to obtain the lease—entailed not a loss of investment but only a loss of an economic opportunity. This redefinition of coercion seems to recognize implicitly that the interaction of competitive forces necessary for maintenance of a market economy can only be preserved by preventing firms from abusing market power, and that generally a firm will agree to comply with conditions such as those imposed in Simpson simply because it has no equally advantageous alternative. The firm in the superior market position is able to impose such terms because refusal by one party will not preclude finding another who is willing. Moreover, barring one who has complied with such terms from judicial remedy would not seem likely to deter him, since, even if warned he would fail in a later suit, he will still accept the best economic opportunity. Because the plaintiff has not initiated the conspiracy and is coerced in a very real, albeit economic, sense, the defense of *in pari delicto* should fail unless the defendant can establish that the plaintiff either encouraged the scheme or actively assisted in its operation or formulation. In keeping with economic realities, the rejection of the defense here should be accompanied by a rule of law that to require acceptance of unlawful terms as a condition of dealing is of itself sufficient to establish coercion which cannot be rebutted by a showing that plaintiff could have dealt on legal terms with equal advantage elsewhere." 78 Harv. Law. Rev. at 1246]

[8] See A 139-140: Coercion of Ross. Respondents forced all franchisees, including petitioners, to adhere to the unlawful provisions in the franchise agreement once franchisees accepted the agreement.. See *infra*, sections IIA and IIC at 22 and 29.

"Q. With whom did you first discuss the MIDAS brand?

A. Charles Lichterman.

Q. Remember when that discussion took place?

A. It was prior to April 1, 1956.

Q. Was it in 1956?

A. Yes sir, to the best of my recollection it was.

Q. Do you recall the substance of that discussion?

A. Yes, sir. Mr. Lichterman called on me. We sat in my office and he presented me with this Midas franchise. I told him I wasn't interested in it. Because of my experience with franchises in the past, I told him that I was satisfied to operate as an independent operator."

* * *

Q. What was the nature of that experience?

A. By that, I mean it was my experience that the companies that franchised a dealer pressured the dealer to handle their merchandise exclusively and objected to the purchases of merchandise from other sources of supply.

Q. Was this mainly your experience with appliance lines or –

A. No, sir, general.

Q. Any particular line?

A. Well, for example, Firestone. We primarily took on that franchise to handle their tires. That was a major part of our business and, actually, they tried hard to sell us allied lines that they handled, and inasmuch as we were operating more or less independently, we resisted this pressure and conducted our business as we saw fit. *And for that reason, I did not want to tie myself up with any franchise.* I was satisfied to operate as I had in the past, handling International mufflers and shock absorbers and springs which I purchased from other sources." [Pierce Dep. 40-41, emphasis supplied].

Thereafter when respondents suggested that (1) they would refuse to continue to sell him their International brand muffler which he already carried in his independent muffler

installation shops and his other retail outlets, and (2) advised him that he might face stiff competition from some future MIDAS franchisee if he refused the franchise, Pierce accepted the MIDAS franchise. [A 124-125]

Application of the *in pari delicto* doctrine here conflicts with the central policies of the antitrust laws, particularly Section 4 of the Clayton Act. If the doctrine is applied, franchisors can make a mockery of the antitrust laws without fear of liability to their franchisees by the absurdly simple technique of reducing unlawful antitrust restrictions to the very agreements which the antitrust laws specifically condemn. This will surely encourage antitrust violators. Franchisors will have little to fear from their schemes in violation of the antitrust laws if their only exposure to franchisees is the threat of the prospective provisions of an injunction under Section 16 of the Clayton Act (15 U.S.C. 25). Fear of a treble damage action, however, will discourage franchisors and others from initiating illegal arrangements. The threat of a treble damage action is a far more potent deterrent to antitrust violations than is the threat of an injunction,[9] or the threat of enforcement by either the Department of Justice or the Federal Trade Commission. The penalty of treble-damages is far more efficacious since treble damage verdicts easily can exceed the criminal or civil penalties which a court is likely to impose in an action brought by the Government. See 113 Pa. L. Rev. 1071, 1080 (1965) "Unclean Hands, the Effect of Antitrust Violations on Antitrust Actions".

[9] Respondents suggest that if the relief sought by petitioners were merely injunctive in nature that there would be more merit to the claim. [RB 44] This appears to be an illogical contention. Since the doctrine of *in pari delicto* is equitable in nature it would be more logical to conclude that it would have greater efficacy in an injunction action, an action in equity, than it would have in a damage action, an action at law. If *in pari delicto* applies to an action at law, it surely ought to apply in an action in equity. To argue that it applies in an action at law but not in an action in equity seems anomalous.

II

RESPONDENTS CANNOT JUSTIFY THE UNLAWFUL RESTRAINTS IN THEIR MIDAS FRANCHISE AGREEMENTS BY ARGUING THE MERITS OF THEIR PLAN

[This Section discusses material in Respondents' Brief, pp. 58-68]

A. Respondents Forced Petitioners To Adhere to the Unlawful Restrictions in Their Franchise Agreements.

Respondents attempt to create the impression that while their franchise agreement form may have contained provisions which are proscribed by the Sherman and Clayton Acts respondents did not compel their franchisees, including these petitioners, to adhere to those provisions. To bolster this notion respondents rely upon two "judiciously" selected passages from the deposition testimony of one of the petitioners herein, Joe Pierce [RB 60]. These incomplete references do not prove the point. To fully understand Mr. Pierce's testimony it is necessary to read the questions and answers leading up to the testimony which the respondents quote as well as the questions and answers following the testimony which they quote [Pierce Dep. 157-164, emphasis supplied; the portions of this testimony quoted in Respondent's Brief are in bold face]:

> "Q. Now, when you were installing International mufflers in that period of '56, prior to the time that you entered the Midas program, were you also purchasing from International either springs or shocks [shock absorbers]?
>
> A. Shocks.
>
> Q. Shocks?
>
> A. Only.
>
> Q. Only. *Now, did you cease purchasing shocks from International after you got into the Midas program?*
>
> A. *Yes.*

Q. Was it shortly after or when?
A. I would say shortly after.

Q. *And what was the reason for that action?*
A. *We were definitely advised that they were not in favor of us selling shocks or springs.*

Q. Did anyone from International or Midas advise you that International would no longer furnish you with shock absorbers?
A. No, I don't think so.

Q. Did you ever order any shock absorbers from International and have your order refused, after you were in the Midas program?
A. No, sir.

Q. So that this was a matter of your own decision in choosing to purchase shocks from other than International, is that correct?
A. No, sir.

Q. Why isn't it?
A. Because *I was advised by the field counselor that they did not approve the sale of shock absorbers in Midas shops.*

Q. But no one from International ever refused to sell you shock absorbers, did they?
A. I just discontinued ordering them from International.

Q. I assume that conversation was with Mr. Lichterman?
A. Yes, sir.

Q. *With whom else at Midas or International other than Mr. Nathan Sherman have you discussed the sale of shock absorbers by you as a Midas dealer?*
A. *Other field counselors.*

Q. Which one?
A. *All of them.*

Q. When was the first such conversation following Mr. Lichterman?
A. *If I remember right, the next field counselor was Jack Gordon. When he visited my shop the sale of shocks and springs were discussed.*

Q. Was this in Syracuse?
A. In Syracuse.

Q. Erie Street or –
A. Erie Boulevard.

Q. Erie Boulevard?
A. *As per orders from Mr. Gordon Sherman.*

Q. This is what he told you?
A. That's what Jack Gordon told me.

Q. What did he just say in substance?
A. *He said he had an assignment and the assignment was that he was to talk to me about discontinuing the sale of shocks and springs.*

Q. And what did you tell him?
A. I told him I thought it was ridiculous because shocks and springs were a very important part of our business, our established business, and that also, I felt it was unreasonable because we had been selling shocks and springs at the time they offered us the Midas franchise.

Q. And then, what did he say?
A. And it wasn't made a condition of the franchise, as far as discontinuing the shocks and springs.

Q. And what did he say, if anything?
A. *Well, he said his assignment was to tell me to discontinue the sale of shocks and springs,* and if I wouldn't, there was not much he could do about it; all he could do was make his report.

Q. Did you have any further conversations with him on this subject?
A. At different times.

Q. What did or would he say then?
A. *Practically the same conversation. He would advise me that it was his assignment, and he had to carry it through.*

Q. Who was the next field counselor you discussed this problem with?
A. Bill Zuckerman. I am not sure now if he came next to Jack Gordon.

Q. Will you give us the substance of your conversations on this subject with Mr. Zuckerman?

A. *Mr. Zuckerman told me that Gordon Sherman would like to have me discontinue the sale of shocks and springs,* and this same conversation, practically the same conversation came up on subsequent visits.

Q. And did you ever discuss it with Mr. Liss?

A. Yes, sir.

Q. And will you describe the substance of those conversations?

A. Practically the same conversation and the same answer.

Q. And Mr. Vosk?

A. I am not positive about Mr. Vosk.

Q. *Did any one of these field counselors ever threaten to withdraw your franchise if you didn't drop shocks or springs?*

A. *I was never threatened but they discussed the possibility.*

Q. Which one; which field counselor?

A. All of them.

Q. How would they discuss it?

A. *Well, they pointed out to me that the contract could be cancelled.*

Q. *Did they call your attention to any paragraph in the contract?*

A. *In other words, they didn't hand me a contract and show me the paragraph.*

Q. They did not?

A. No, but **I knew it was in the contract and they knew it, but I did not feel it applied to me** inasmuch as I handled these products to begin with. They were a part of my business and a very important part. In fact, I suggested to Mr. Nate Sherman he should add these items to his line, that I felt that would bring in more customers.

Q. This was in this conference at Chicago?

A. At one of them.

Q. Now, did you ever discuss this problem with Gordon Sherman?

A. Yes.

Q. When was the first such conversation?

A. On Mr. Gordon Sherman's visit to Syracuse and my other shops.

Q. Well, will you describe that conversation, please?

A. We were driving to Utica – Gordon Sherman, Mark Vosk and myself, to visit the Midas Shop in Utica, and the pressure had been so great previous to this regarding shocks and springs that it was getting to the point where, well, I guess we were both unhappy about it, and while we were driving to Utica, I said, **'Gordon, now how about this shock and spring business? I am sitting right on top of a fence, and if this continues I will have to go one way or the other.'**

He said, 'Joe, I will never tell you not to sell shocks and springs.' And I guess that was just about it, as well as I remember the conversation.

Q. Were any discussions – go ahead.

A. *Previous to this, the same day, we visited my warehouse on State Street and Gordon Sherman noticed some tailpipes from the Texas Tailpipe Company. He said, 'What is this Joe?' I said, 'Well, tailpipes from the Texas Tailpipe Company,'*

Gordon Sherman said, 'Joe, you know this is just like a marriage. It is like cheating on your marriage. It is grounds for divorce.' And he dropped it. That's about all. . . ."

Other testimony of Pierce sheds further light on methods used by respondents to enforce the restrictive provisions in their franchise agreements [Pierce Dep. 94-95]:

"Q. You indicated you had a conversation with Mr. Nate Sherman about carrying shocks and springs?

A. Yes I did.

Q. Do you remember when that was?

A. That would be the first visit or the second.

Q. The first visit to Chicago, is that right?

A. Yes. But I am almost sure it was the first visit.

Q. Would you describe the subject you discussed?

A. It was discussed in his office.

Q. Describe the substance of that conversation.

A. Well, it was a very friendly visit, and he mentioned to me that they objected to my handling of springs and shocks, also a short period I was installing brakes, and I agreed not to install brakes, and also agreed not to sell shocks and springs in my Elmira and Rome shops inasmuch as they were opened at a time after my original franchise.

What I am trying to say is this, originally prior to April 1, 1956, when the first three franchises were signed, we handled shocks and springs. So, when the question of shocks and springs was brought up, I agreed to discontinue them in the shops I opened after this period. In other words, I did not have them originally in these shops. But I did not agree to go along on the shops I had established before the Midas franchise."

Respondents' carefully selected references from the deposition testimony of Petitioner Pierce also ignore the following testimony which is printed in the record [A 128-129]:

> "Q. Did you discuss this with Mr. Lichterman at the time you signed the first franchise?
>
> A. I did.
>
> Q. What did he say?
>
> A. I told him that this paragraph that restricted me from selling nothing but exhaust muffler parts was just impossible for me to abide with, because I had shocks and springs for sale in my place of business, and I liked it. It was very a profitable part of my business, and I did not intend to discontinue the sale of them, and he said I wouldn't have to."

Respondents' suggestions that they did not enforce the restrictive provisions in their franchise agreements for the period 1955 to 1960 defies the written record made by

respondents' own hand. Respondents for example, terminated one of their franchisees for violating his franchise by selling brakes [A 177].[10] Respondent Sherman advised field counselors that it was "essential to participation in the Midas program that [their] dealers do not buy [tailpipes]" from the Texas Tailpipe Company [A 189]. Respondents even initiated a surveillance program to determine which of their dealers were purchasing their tailpipes from MIDAS [A 195-196]. Petitioner Pierce was one of the franchisees "isolate[d]" by this program [A 195]. Respondents' field counselors heeded Sherman's advice: One of them warned Petitioner Ross on several occasions. He wrote Ross and called his attention to the fact that Ross's automotive "glass business" was "against Midas policy" and that it was one of the points which was in the "limelight" [A 191]. The field counsellor, Gurnick, also wrote all of the dealers within his sphere of influence warning them that it was "Midas policy" to "buy" their "clamps", "Hollywood Mufflers" and "tailpipes" from MIDAS [A 193]. Later this same field counselor wrote petitioner Ross that he had been advised by Gordon Sherman that Ross was not "purchasing popular clamps from Midas." He said the clamps were "priced right, and even more important it was part of the policy to make such purchases from Midas." [A 194].[11]

It is obvious that, contrary to the allegations of respondents, petitioners "did not operate under the [so called] current unrestricted Midas franchise agreement form which has been in effect since 1960" during the period 1955 to 1960 [RB 60]. Petitioners operated under the franchise agreements in effect during 1955-1959. The terms of those agreements were enforced in letter and spirit. Each such agreement contained price fixing, exclusive dealing and tie-in provisions.

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[10] At a field counsellor meeting in the Fall of 1959 two of the principal topics on the agenda were: "How much can we take from Joe Pierce? A report on shocks and springs in Buffalo" [A 200]. Several months later Sherman described Pierce's "separation from the program" as the result of a "nervous list of offenses" [A 201].

[11] See also A 141-143.

B. Respondents Cannot Revive Their Trademark Defense.

Respondents seek to justify the merits of their program through the use of a trademark defense [RB 58, 60-62]. This defense is not available to respondents.[12] Moreover, it is wholly improper for respondents to assert it here. A comparison of respondents' argument at 60-62 in their brief with pages 21 through 27 of their Motion for Summary Judgment [R 1171-1178] reveals that the arguments now made are almost identical to the arguments which respondents made in the District Court. Respondents' arguments in the District Court were stricken on motion [R 1343-1354] of petitioners [A 113-114]. The history of that motion, decision and order are set forth in a memorandum which the petitioners filed with the United States Court of Appeals in No. 15862 on January 18, 1967. The District Court's decision was predicated on the fact that respondents refused to allow discovery with regard to their trademarks asserting in an objection to petitioners' interrogatory that the "complaint raises no issue respecting these trademarks, and the information sought is entirley irrelevant" [R 280]. Respondents did not appeal the decision of the District Court and it is wholly improper for them to raise the merits of their trademark defense in this Court when they have denied petitioners discovery relating to the very trademarks which they now attempt to use to justify the unlawful restrictions in their franchise agreements.

C. Respondents Enforced an Unlawful Tying Provision.

Respondents object to petitioners' assertion that their franchise agreement encompassed a tie-in which was unlawful [RB 62]. They assert that there was nothing unlawful about requiring franchisees to purchase tailpipes, exhaust

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[12] *Anchor Serum Co. v. F.T.C.*, 217 F.2d 867, 870-871 (C.A. 7, 1954); *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593, 598-599, 71 S. Ct. 971, 974-975 (1951).

pipes, and clamps [RB 63]. According to respondents the record does not even show that petitioners are claiming direct damages for such required purchases [RB 63]. Apart from that they suggest that their obtaining of registrations for the MIDAS trade and service marks which "covered" tail-pipes and exhaust pipes as well as the muffler [RB 63] somehow insulated the practice from antitrust liability. Moreover, Respondents also assert that the arrangement was not unlawful *per se* because Respondents did not have "sufficient economic power with respect to the tying product [the MIDAS muffler] to appreciably restrain competition in the market for the tied product[s]" [RB 63]. In any event respondents assert a tying device can be employed by a small company such as MIDAS "'in an attempt to break into the market'" [RB 63].

None of these arguments can stand.

(1) *Petitioners Claim Direct Damages from the Forced Purchase of Tailpipes, Exhaust Pipes and Clamps.*

Respondents' assertion that "the indisputable record fact [is] that [petitioners] are claiming direct damages from the purchase of the MIDAS Muffler alone" [RB 63] is not true. To support this statement Respondents refer to answers to interrogatories filed by petitioners Ross, Skarupa, Wheeler and Pierce. However, even a cursory reading of the very interrogatory answers which respondents cite refutes their contention. The full text of Ross's interrogatory answer, which is nearly typical, proves the point [R 899]:

> "[Petitioners] were required to purchase exhaust system parts exclusively from the [respondents] and as a result paid more for such parts by approximately 19% in the case of tail pipes, exhaust pipes, glas pack mufflers, clamps, hinges, etc., and 12% in the case of mufflers, than they would have paid had they been permitted to purchase them from alternative sources of supply. Total purchases of such parts from the [respondents] were $453,698.00 (121,-793.00 for tailpipes; exhaust pipes, glas pack mufflers,

> clamps, hinges, etc.; $331,905.00 for mufflers). Damages: $62,962.00."

Obviously, petitioners *are* claiming "direct damages" from tailpipe, exhaust pipe and clamp purchases which they were forced to make from MIDAS.

(2) *Respondents Did Not Use Their Trademarks on Tailpipes, Exhaust Pipes and Clamps.*

The record shows that respondents did not apply the trademark MIDAS to their tailpipes, exhaust pipes, clamps or hollywood mufflers. The Court of Appeals conceded an issue of fact on this point [A 221-222]. Defendant Schroeder testified as follows [A 166]:

> "Q. Was the Midas name placed on any of these items by putting the item in a box with a Midas name on it or by attaching a tag with a piece of wire or string during any of the period 1955 through and including 1960?
>
> A. Not to my knwoledge."

Petitioner Ross said [A 221]:

> "We could see no purpose, really, in buying pipes of that kind from Midas. There was no quantity discount. There was no freight allowance except the freight allowance when we shipped in larger quantity. Then we got a lower rate.
>
> "There was no insignia on the pipe. Certainly we wouldn't be confusing anybody by selling a pipe from Texas rather than a pipe sold to us by Midas."

Petitioner Skarupa's testimony was to the same effect [A 222]:

> "A. I don't think we can ascribe the word 'Midas' to the tailpipes because they weren't identified as such and people didn't come in asking for Midas tailpipes. There was no guarantee on the tailpipes.
>
> Q. They were not identified as 'Midas' on the boxes were they not?
>
> A. No, sir.

Q. They were not?
A. Sir?
Q. They were not?
A. Midas tailpipes were not identified as Midas tailpipes, as you are stating it.
Q. On the boxes in which they were shipped?
Q. The tailpipes didn't come in boxes; they came in bundles.
Q. There was no identification of 'Midas' or anything on anything on the bundles?
A. The packing slip which was tied with wire, but that wasn't affixed to the tailpipes."

While respondents obtained registration of the mark "MIDAS" to cover tail pipes, exhaust pipes and clamps they did not apply the mark to these items. Their mere registration could not insulate respondents' tying practices from the antitrust laws. Indeed, it would be petitioner's contention that registration *and* use could not insulate such practices; but here we need not concern ourselves with such a hypothetical situation because there was no use of the trademarks on these items.

(3) *Respondents Had Sufficient Economic Power with Respect to the Midas Muffler To Appreciably Restrain Competition in the Market for Tailpipes, Exhaust Pipes, and Clamps; Respondents Were Not a Small Company Breaking into a Market.*

Respondents suggest that they did not have sufficient economic power with respect to their MIDAS muffler to restrain competition in the sale of tailpipes, exhaust pipes and clamps. They offer nothing to support this contention which ignores the fact that respondents sold their MIDAS muffler under the auspices of a national advertising program whose cost exceeded $3,000,000 and featured the trademark as well as a "unique" coast to coast lifetime guarantee. These facts satisfy the test stated in *White Motor Co. v. United States,* 372 U.S. 253, 262-263, 83 S.Ct. 696 (1963) and cases cited therein. Sufficient economic power may be in-

ferred from the desirability of the tying product to consumers or from uniqueness in its attributes. *United States v. Loews, Inc.*, 371 U.S. 38, 45, 83 S.Ct. 97, 102 (1962). Indeed the required control of the tying product "may be inferred from the seller's success in imposing a tying condition" upon a substantial amount of commerce in the tied product "at least in the absence of some other explanation for the existence of the restraints." *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (C.A. 9, 1964), cert. denied 377 U.S. 993, 84 S.Ct. 1920 (1964).

Respondents can hardly be considered a "small company" attempting to break into a market. The parent company was organized in 1938 [A 65]. For over a quarter of a century prior to 1955 it engaged in the wholesale distribution of automotive replacement parts, "primarily exhaust parts, i.e., mufflers, tailpipes and exhaust pipes" [A 65]. In the ensuing three years, with the aid of tying agreement provisions in their MIDAS franchise agreement, respondents increased their wholesale volume more than three fold to more than $17,000,000 annually [RB 13]. They cannot be considered "a small company" breaking into a market. Their volume was substantial in 1955 when they initiated the MIDAS concept; and their business history of over a quarter of a century hardly suggests that they were breaking into a market in 1955. They were already in the market in a substantial way.

Respondents' present attempt to segregate MIDAS sales from International Sales is rather anomalous in view of their repeated assertions heretofore that MIDAS and International are one and the same company. It is often difficult for petitioners to determine which "shell the pea is under". During the course of discovery respondents were particularly careful to make it plain that MIDAS, INC. made *no* sales from the time it was organized until the date of the complaint [Sherman Dep. 147-148]. Indeed, in their response to petitioners' subpoena duces tecum of November

22, 1966 they *made it absolutely plain that MIDAS made no sales.*[13]

Respondents' protests against petitioners' "attribution" of $17,000,000 in sales, and 350 MIDAS muffler shops in 42 states, as well as their comparison of their MIDAS brand sales of $8,000,000 to petitioners' sales of $1,774,000 is, to quote respondents, "seriously misleading". Respondents admit to only 258 MIDAS muffler shops at the time petitioners' franchises were terminated [RB 63]. According to the December 1959 issue of respondents' "Dealer Dabbler" [Krieger Dep., Plaintiffs' Exhibit 29 for identification], however, respondents ended the year 1959 with almost 325 muffler shops in operation. Moreover, by August 16, 1961 according to an S.E.C. prospectus of International Parts Corporation, the number of such shops had increased to 355, not counting 18 shops which company subsidiaries operated themselves. The May-June 1960 issue of the "Dealer Dabbler" [Krieger Dep., Plaintiffs' Exhibit No. 35 for identification] represents that respondents' franchisees operated muffler shops in 43 states.

It is difficult to understand the MIDAS sales figures used by respondents in their brief in light of the record (RB 13]. Jacob, on whose testimony respondents rely, testified that he had no idea of the total value of sales of the so-called MIDAS division of International Parts, Inc. [Jacob Dep. 167]. He represented his estimates of $4,000,000, $6,000,000, and $8,000,000 in MIDAS brand sales as nothing more than guesses [Jacob Dep. 170]. Recognizing that MIDAS *brand*

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Product	*Product Sold By* International	Midas	Powell	MCA	Approximate Years in Which Sold
(1) Mufflers	X		X	X	1955-1960
(2) Exhaust Pipes	X		X	X	1955-1960
(3) Tail Pipes	X		X	X	1955-1960
(4) Shock Absorbers	X				1955-1960

* * *

sales do not reflect all of MIDAS franchise purchases of tail-pipes, exhaust pipes and clamps (none of which were trade-marked), the figures which respondents represent in their brief [RB 12-13, 63] are meaningless in the context in which respondents use them. This becomes even more evident when one realizes that these same sales represent sales at whole-sale whereas the figures attributed by respondents to petitioners represent sales at retail. Literally the figures have no relationship to one another. One fact, however, does emerge and that is that the respondents have not contested petitioners' assertion that respondents, with 11% of the market, were the fifth largest distributor of automotive exhaust parts for the replacement market in the United States in the year 1960 [PB 14-15]. Petitioners submit that respondents had sufficient economic power, with respect to their $8,000,000 MIDAS Muffler sales, to appreciably restrain competition in the sale of non-trademarked tailpipes, exhaust pipes and clamps, and that an appreciable amount of commerce in tailpipes, exhaust pipes, and clamps was in fact restrained ($17,000,000 total sales, including muffler sales).

D. Respondents "Reneged on Their Original Promise" With Respect to Their Guarantee.

Respondents object to petitioners' characterization [RB 64-65] of their 1959 change in their guarantee program as either "unilateral" or as "reneg[ing] on their original promise." In any event they assert that this change did not constitute a violation of either Section 1 of the Sherman Act or Section 3 of the Clayton Act. [RB 65].

Respondents have misstated the record as well as petitioners' complaint. Petitioners have never contended that respondents' guarantee program or any changes made in that program constituted a violation of either Section 1 of the Sherman Act or Section 3 of the Clayton Act. They have contended that respondents' change in their guarantee program constituted an antitrust violation of Section 2 of the Robinson Patman amendments to the Clayton Act, 15

U.S.C. 13. The Court of Appeals sustained this contention by remanding petitioners' Robinson-Patman Claim to the District Court for Trial. [A 216-223].

Whether respondents' decision to reduce their share of the guarantee replacement expense from 100% to 50% represented a "unilateral" change in their guarantee and constituted a "reneg[ing] on their original promise" is a question of fact. In light of the record, however, the fact is hardly susceptible to interpretation. Respondents cannot rely (though they did in their brief) upon the testimony of Pierce to support their contention that the National Advisory Council "adopted" a decision to share the guarantee expense on a "50-50 basis" [RB 64]. The National Advisory Council did not "adopt" such a decision and the testimony on which the respondents erroneously rely clearly shows this [Pierce Dep. 171-173]:

"Q. Now, coming back to this October, 1958 meeting at which the guarantee was discussed—

A. Yes, sir.

Q. Did you participate in the discussion of the guarantee?

A. No, sir—in the discussion?

Q. Yes, sir.

A. Of the guarantee?

Q. Yes.

A. I don't think we had any opportunity to discuss the guarantee. We were told that the guarantee was changed to a fifty-fifty basis.

Q. Isn't it a fact that at that meeting Mr. Gordon Sherman announced the policy and then asked the National Advisory Council to discuss it among themselves?

A. Yes.

Q. Didn't you do that?

A. We did, but—

Q. What was the substance of that discussion?

A. Well, naturally, the dealers were dissatisfied with the new policy on guarantee, and I discussed

> with the Advisory Council, I said, 'if you fellows feel that way about it, why don't we say something about it, sit down and say something about it.' When we sat down we didn't have an opportunity to say anything about it. It was just passed over like that. In other words, that was the new policy, and Mr. Gordon Sherman made up his mind it was a fifty-fifty basis, and obviously, it was useless to discuss it."

Whether or not respondents' franchise required respondents to defray 100% of the guarantee replacement expense is also a question of fact, and it too is hardly susceptible to interpretation. The franchise agreement provided:

> "Seller agrees, during the continuance of this agreement, to replace and/or adjust to the Buyer any merchandise purchased from the Seller by the Buyer within the limits of such specific guarantees as Seller furnishes" [A 42-43].

Under the quoted language respondents were required to make their guarantee "good" whatever it was. In any event respondents' arguments about their guarantee do not by any manner or means justify the unlawful restrictions in their franchise agreement.

III

THE RECORD ESTABLISHES THE FACT OF A CONSPIRACY IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT AS WELL AS AN AGREEMENT IN RESTRAINT OF TRADE IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT.

(This section discusses material in Respondents' Brief, pp. 68-72)

Respondents argue that petitioners have "abandoned" their contention that respondents conspired in violation of Section 1 of the Sherman Act [RB 70]. They complain that petitioners are now attempting to "revive" this contention. This assertion is at odds with the record.

Petitioners never abandoned their conspiracy contentions. In their brief in the Court of Appeals they contended that the conspiracy among respondents here came within the doctrine announced by the Fifth Circuit in *Nelson Radio and Supply Co. v. Motorola,* 200 F.2d 911, 914 (C.A. 5, 1952) where the Court said:

> ". . . and of course a corporation and its subsidiaries can be guilty of a conspiracy in restraint of trade, but that involves separate corporate entities . . ."

Respondents' "abandonment" argument ignores petitioners' brief in the Court of Appeals [Petitioners' Brief, Appeal No. 15872, C.A. 7, 1967 at 34-35]. Their argument that no conspiracy existed also ignores the record. MIDAS, Inc. and International Parts, Inc. held themselves out as "competitors" and as "separate and divorced" despite respondents' protests to the contrary. Indeed Circuit Judge Cummings in his dissent had little trouble finding a conspiracy [A 226]:

> "With respect to the majority's alternate basis discussed at [A 215] supra, this record shows that Midas and International held themselves out as separate and 'divorced'. Therefore *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, does not permit [respondents] to claim that as a single business entity they were unable to conspire. Furthermore, under *Simpson v. Union Oil Co.,* 377 U.S. 13, and *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, a conspiracy is not needed to support Count I [the section 1 Sherman Act Claim]."

Circuit Judge Cummings' findings are fully supported by the record. Gordon Sherman acknowledged advising MIDAS franchisees[14] that International was "divorced" from MIDAS [Sherman Dep. 65]:

> "There are only three points which need particular emphasis, I think. Divorcing International Parts from Midas was covered. I am speaking of my

[14] Franchisees thought that MIDAS, Inc. and International Parts were separate and distinct companies [Ross Dep. 98].

> father now. This afternoon at the Owners Luncheon; I think it was treated to everyone's satisfaction. They are completely divorced except that one helps to carry the other."

That International and MIDAS were competitors is borne out by the testimony of petitioner Ross. He stated that he frequently made complaints to Gordon Sherman about sales of International Brand Mufflers by Tideys, one of his competitors. Tideys retailed and installed an International Brand muffler with a guarantee which was the "same" as the MIDAS guaran-
tee in competition with petitioner Ross [A 137]. Ross complained because he was unable to compete with Tideys since he had to maintain the resale price fixed by MIDAS, whereas Tideys was free to sell the International Brand muffler below the price which Ross was required to maintain [A 137]. Tideys in fact advertised the International Brand muffler as being the same as respondents' MIDAS muffler with the same guarantee [Ross Dep. 211]. Sherman's only response to Ross's complaint was to express "wonderment that [Ross] should feel restricted by the MIDAS maintain-the-price merchandising. . . ." [A 197].

Further evidence that the respondents International and MIDAS conspired with one another is the fact that International refused to sell its International Brand muffler to MIDAS franchisees while MIDAS, Inc. refused to sell its MIDAS brand to customers of International. The Court below alluded to this in its opinion in remanding petitioners Robinson-Patman Claim. The Court of Appeals said [A 219]:

> "We think the finding, 'the evidence is uncontroverted in demonstrating that [petitioners] were free to purchase either product [International or Midas] but chose Midas is erroneous. [Petitioners'] freedom in this respect was forfeited by the terms of the franchise agreements. The record contains much evidence that there was a continuing effort on the part of Midas to enforce the exclusive dealer requirement.

"A few excerpts from the record are sufficient to demonstrate at least that there was an issue as to whether [petitioners] were free to handle any product other than purchased from Midas. . . ."

Pierce's testimony to which respondents refer in their statement of the case [RB 17-18] does not refute the foregoing statement of the Court of Appeals. Respondents suggest that Pierce testified that he was not cut off from the International brand by International Parts after he became a MIDAS dealer. He did say that he continued to buy International brand parts for his retail stores throughout his association with MIDAS. [RB 17-18]. While this is true, the respondents fail to mention the fact that the record shows that Petitioner Pierce continued to sell International Brand products at his "retail" locations which were not franchised by the respondent MIDAS as distinguished from his locations which were franchised by respondent MIDAS. Respondents did not sell Pierce the International brand for his MIDAS installation shops. Under the circumstances, the fact that International continued to sell its International Brand mufflers to Pierce means nothing [Pierce Dep. 28, 47]. The plain fact is that International would not sell its International brand muffler to MIDAS dealers and MIDAS, Inc. would not sell its MIDAS brand muffler to International dealers. Neither company would compete with the other for sales despite the fact that their customers competed with one another. Compare *Hawaiian Oke Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D.C. Hawaii, 1967).

The lower court's dismissal of Count I, Petitioners' Section 1, Sherman Act claim, was erroneous in any event since conspiracy is not essential to state a claim under Section 1 of the Sherman Act. The record disclosed hundreds of franchise agreements in restraint of trade. These agreements are proscribed by Section 1 of the Sherman Act as well as Section 3 of the Clayton Act. Respondents' argument that petitioners did not plead an agreement in restraint of trade within the meaning of Section 1 is nothing more than a

compartmentalization of the various factual components of the complaint and "wiping the slate clean after scrutiny of each." Petitioners' complaint should not be judged "by dismembering it and viewing it in separate parts, but only by looking at ~~it as~~ a whole." *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410 (1962).

IV

SUMMARY JUDGMENT IS INAPPROPRIATE UNDER THE CIRCUMSTANCES OF THE CASE AT BAR SINCE THERE WERE DISPUTED ISSUES OF MATERIAL FACT.

[This section discusses material in Respondents' Brief pp. 73-75]

The record raises substantial issues of fact which should have been decided on trial by a jury and not by a Judge on a Motion for Summary Judgment. The Court below ignored petitioners' demand for jury trial and decided factual issues without reference to what a jury might have done with the record before it. The District Court had no right to decide this case on a Motion for Summary Judgment in view of the substantial factual questions which existed. Examples of some of these are:

(a) Whether all petitioners "voluntarily entered into" the agreements which are the subject of this litigation.

(b) Whether respondents coerced, intimidated or used other means of illegal persuasion to compel petitioners to observe the unlawful provisions in respondents' franchise agreements.

(c) Whether respondents tied the sale of unbranded automotive exhaust system parts such as tailpipes, exhaust pipes, clamps, hangers and hollywood mufflers to the sale of their MIDAS muffler.

(d) Whether there was a conspiracy among respondents to fix prices or in any other manner restrain trade.

(e) Whether respondents terminated petitioner Pierce's dealer agreements because he refused to adhere to the unlawful provisions of the respondents' franchise agreement.

By granting summary judgment the Court below removed these and other factual decisions from the province of the jury which the petitioners demanded.

CONCLUSION

For all the foregoing reasons, petitioners respectfully urge that the decision of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 733.—October Term, 1967.

Perma Life Mufflers, Inc. et al., Petitioners, *v.* International Parts Corp. et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 10, 1968.]

Mr. Justice Black delivered the opinion of the Court.

The principal question presented is whether the plaintiffs in this private antitrust action were barred from recovery by a doctrine known by the Latin phrase *in pari delicto*, which literally means "of equal fault." The plaintiffs, petitioners here, were all dealers who had operated "Midas Muffler Shops" under sales agreements granted by respondent Midas, Inc. Their complaint charged that Midas had entered into a conspiracy with the other named defendants—its parent corporation International Parts Corp., two other subsidiaries, and six individual defendants—who were officers or agents of the corporations—to restrain and substantially lessen competition in violation of § 1 of the Sherman Act [1] and § 3 of the Clayton Act.[2] They also charged that the defendants had violated the Robinson-Patman Act [3] by granting discriminations in prices and services to some of their customers without offering the same advantages to the plaintiffs. The District Court entered summary judgment for respondents with respect to all of petitioners' claims. On appeal the Court of Appeals reversed the judgment for respondents on the Robinson-Patman claim but, over Judge Cummings' dissent, affirmed the

[1] 26 Stat. 209 (1890), 15 U. S. C. § 1.

[2] 38 Stat. 731 (1914), 15 U. S. C. § 14.

[3] 49 Stat. 1526 (1936), 15 U. S. C. § 13.

District Court's ruling that the other claims were barred by the doctine of *in pari delicto*. The court also held that petitioners' Sherman Act claim was barred because Midas and International, while functioning as separate corporations, had a common ownership and therefore could cooperate without creating an illegal conspiracy.[4] 376 F. 2d 692 (1967). Because these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States, we granted certiorari. — U. S. — (1968). For reasons to be stated, we reverse.

The economic arrangements that led to this lawsuit have a long history. Respondent International Parts has been in the business of manufacturing automobile mufflers and other exhaust system parts since 1938. In 1955 the owners of International initiated a detailed plan for promoting the sale of mufflers by extensively advertising the "Midas" trade name and establishing a nationwide chain of dealers who would specialize in selling exhaust system equipment. Each prospective dealer was offered a sales agreement prepared by Midas, Inc., a wholly owned subsidiary of International. The agreement obligated the dealer to purchase all his mufflers from Midas, to honor the Midas guarantee on mufflers

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[4] In their motion for summary judgment respondents also argued that the restraints were permissible as reasonable means to protect their registered trade and service marks, but because they had failed to answer interrogatories pertinent to this defense, the district judge ordered it stricken, without prejudice to renewal if respondents promptly answered the relevant interrogatories. Because of its disposition of the case, the Court of Appeals reached neither the merits of this defense nor the question whether respondents had ever properly renewed it. In the circumstances of this case, we think the merits of this defense cannot be decided as a summary judgment question but must be resolved, along with all the other issues, by a trial on the merits.

sold by any dealer, and to sell the mufflers at resale prices fixed by Midas and at locations specified in the agreement. The dealers were also obligated to purchase all their exhaust system parts from Midas, to carry the complete line of Midas products, and in general to refrain from dealing with any of Midas' competitors. In return Midas promised to underwrite the cost of the muffler guarantee and gave the dealer permission to use the registered trademark "Midas" and the service mark "Midas Muffler Shops." The dealer was also granted the exclusive right to sell "Midas" products within his defined territory. He was not required to pay a franchise fee or to purchase or lease substantial capital equipment from Midas, and the agreement was cancelable by either party on 30 days' notice.

Petitioners' complaint challenged as illegal restraints of trade numerous provisions of the agreement, such as the terms barring them from purchasing from other sources of supply, preventing them from selling outside the designated territory, tying the sale of mufflers to the sale of other products in the Midas line, and requiring them to sell at fixed retail prices. Petitioners alleged that they had often requested Midas to eliminate these restrictions but that Midas had refused and had threatened to terminate their agreements if they failed to comply. Finally, they alleged that one of the plaintiffs had had his agreement canceled by Midas for purchasing exhaust parts from a Midas competitor, and that the other plaintiff dealers had themselves canceled their agreements. All the plaintiffs claimed treble damages for the monetary loss they had suffered from having to abide by the restrictive provisions.

The Court of Appeals, agreeing with the District Court, held the suit barred because petitioners were *in pari delicto*. The Court noted that each of the petitioners had enthusiastically sought to acquire a Midas franchise

with full knowledge of these provisions and had "solemly subscribed" to the agreement containing the restrictive terms. Petitioners had all made enormous profits as Midas dealers, had eagerly sought to acquire additional franchises, and had voluntarily entered into additional franchise agreements, all while fully aware of the restrictions they now challenge. Under these circumstances, the Court of Appeals concluded, "[i]t would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine." 376 F. 2d, at 699.

We find ourselves in complete disagreement with the Court of Appeals. There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law *pari delicto* doctrine a defense to treble damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist. Although *in pari delicto* literally means "of equal fault," the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. It was for this reason that we held in *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211 (1951), that a plaintiff in an antitrust suit could not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation. Similarly, in *Simpson* v. *Union Oil Co.,* 377 U. S. 13 (1962), we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws even though by signing the agreement he had to that extent become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart*

were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart, supra.*

In light of these considerations, we cannot accept the Court of Appeals' idea that courts have power to undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others. Although petitioners may be subject to some criticism for having taken any part in respondents' allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was not voluntary in any meaningful sense. They sought the franchises enthusiastically but they did not actively seek each and every clause of the agreement. Rather, many of the clauses were quite clearly detrimental to their interests, and they alleged that they had continually objected to them. Petitioners apparently accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity. The argument that such conduct by petitioners defeats their right to sue is completely refuted by the following statement from *Simpson:*

"The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitust laws." 377 U. S., at 16. Moreover, even if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business. The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages, but once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for completely denying him the right to recover which the antitrust acts give him. We therefore hold that the doctrine of *in pari delicto,* with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

Respondents, however, seek to support the judgment below on a considerably narrower ground. They picture petitioners as actively supporting the entire restrictive program as such, participating in its formulation and encouraging its continuation. We need not decide, however, whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *pari delicto,* for barring a plaintiff's cause of action, for in the present case the factual picture respondents attempt to paint is utterly refuted by the record. One of the restrictions which petitioners most strenuously challenge is the requirement that dealers purchase their supplies exclusively from Midas. Another is the requirement that dealers carry Midas' full line of parts. Neither of these provisions could be in a dealer's self interest since they obligate him to buy from Midas regardless of whether more favor-

able prices can be obtained from other sources of supply and regardless of whether he needs certain parts at all.[5] In addition, the depositions refer to numerous instances in which petitioners asked Midas for permission to purchase from some other source of supply. The record shows that these requests were repeatedly refused by Midas representatives, who underscored the refusals by describing the very requests as "heresy" and by commenting that dealers who bought from outside sources of supply were "asking for trouble" or "were going to be punished." A Midas official warned petitioner Pierce, who had been buying some exhaust parts from other manufacturers, "Joe, this is just like cheating on your wife; it is grounds for divorce."

These statements completely refute respondents' argument that petitioners were active participants and show, to the contrary, that the illegal scheme was thrust upon them by Midas.

There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not

[5] Respondents suggest that these requirements were beneficial to a dealer because they helped him win customers who had confidence in the "Midas" brand, and some dealers evidently did try to reap some benefit from these requirements by advertising, "You get only nationally-advertised Midas products." It seems highly unlikely, however, that benefits of this kind could do more than mitigate very slightly the losses that a dealer would suffer when forced to buy higher-priced Midas products, particularly since dealers would have brought the higher-priced Midas products voluntarily if they thought customer preferences for the brand would be sufficiently strong to offset the higher price.

save them from any of the obligations that the law imposes on separate entities. See *Timken Co.* v. *United States,* 341 U. S. 593, 598 (1951); *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 227 (1947). In any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements, *Albrecht* v. *Herald Co.,* 390 U. S. 145, 150, n. 6 (1968); *Simpson* v. *Union Oil Co., supra,* or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by "the communicated danger of termination," *United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365, 372 (1967); *United States* v. *Parke, Davis & Co.,* 362 U. S. 29 (1960). Although respondents object that these particular theories of conspiracy now pressed by petitioner were not alleged with sufficient specificity in their complaint, this suggestion is completely without merit. Our modern rules provide for trying cases to serve the ends of justice and require that pleadings "be construed as to do substantial justice." Rule 8 (f), Fed. Rules Civ. Proc. The gist of petitioners' cause of action has been clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely on these alternative theories of conspiracy.

It follows that the judgment of the Court of Appeals must be reversed. The case is remanded to that court with directions to reverse in full the judgment of the District Court and to remand the case for trial.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 733.—October Term, 1967.

Perma Life Mufflers, Inc. et al., Petitioners, v. International Parts Corp. et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 10, 1968.]

Mr. Justice White, concurring.

I join the opinion and judgment of the Court with the following observations.

As long ago as 1927, in *Eastman Kodak Co. of N. Y.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927), the Court recognized that participation in an unlawful course of conduct would not bar recovery where the defendant's superior bargaining power led to plaintiff's participation in the unlawful arrangement. In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), where plaintiff was said to have participated in an illegal scheme other than the one charged in his complaint, the Court made it clear that a plaintiff's own delinquency under the antitrust laws would not always bar his treble damage suit. See also *Bales* v. *Kansas City Star Co.*, 336 F. 2d 439, 444 (C. A. 8th Cir. 1964); *Jewel Tea Co.* v. *Local Unions*, 274 F. 2d 217, 223 (C. A. 7th Cir.), cert. denied, 362 U. S. 936 (1960). These cases are enough to warrant reversal in this case, once it is concluded that the illegal arrangement in which petitioners participated was thrust on them by respondents. This is the conclusion reached by the Court and I agree with it.

I also agree that the *in pari delicto* defense in its historic formulation is not a useful concept for sorting out those situations in which the plaintiff might be barred because of his own conduct from those in which he

may have been a party to an illegal venture but is still entitled to damages from other participants. Judgments like these would be better made by hewing closer to the aims and purposes of § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, which gives treble damage recovery to the private plaintiff injured by conduct which violates the antitrust laws.

Under § 4, plaintiff must show not only that the defendant violated the antitrust laws but that his conduct caused the damages alleged in the complaint. Normally, it would be enough with respect to causation if the defendant "materially contributed" to plaintiff's injury, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 702 (1962); or "substantially contributed, notwithstanding other factors contributed also," *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37, 43 (C. A. 1st Cir. 1948), cert. denied, 336 U. S. 967 (1949). The plaintiff need not show that the illegality was a more substantial cause than any other. *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F. 2d 798, 805–806 (C. A. 1st Cir.), cert. denied, 379 U. S. 931 (1964).

Under this rule, a third party proving an illegal undertaking between two defendants may recover for all damages caused by the combination. Those damages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends. This is because neither defendant, if he acted alone, could be charged with the violation; some degree of participation by both is essential to create a combination within the reach of § 1 of the Sherman Act. Either defendant is therefore deemed to have been a material cause of the damages, sufficient to permit a third party to recover.

This may be the result required under § 4 when conspirators are sued by an injured outsider. But what is

the situation when one party to the combination sues the other? Assume three situations: first, A, a manufacturer, sells to B, a retailer. A, over B's objection, insists on B's adhering to specified resale prices. B agrees since A's product is an important part of his business and he can get it nowhere else. B suffers a decline in business because of an inability to match or better the price for competing products. B sues A. He is obviously in position to prove that A was a substantial cause of his injury.

Second, suppose that when B maintains the suggested prices on A's product, he simply sells more of C's competing product, which he also handles. B is not hurt, but A is. A sues B.

Third, suppose that D and E, competitors, combine to fix higher prices. D's best customer sets up his own source of supply to D's great damage. D sues E claiming that E was a substantial cause of his injury.

It is arguable that in each supposed situation recovery should be denied because the plaintiff was a party to the illegality and wrongdoers should be left where they are found. In terms of the deterrent aims of the statute permitting injured plaintiffs to recover treble damages, however, this undiscriminating approach makes little sense. When those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of § 4, since it will deter those most likely to be responsible for organizing forbidden schemes. The principles of *Eastman Kodak Co. of N. Y.* v. *Southern Photo Materials Co., supra,* clearly permit recovery by the less responsible, but injured, party. In the first hypothetical case, therefore, B should recover from A in order to deter A and others like him from imposing resale price maintenance schemes on their customers.

In the second case, where manufacturer A, contrary to his expectations, was injured and retailer B was not, there is no reason, based on the deterrent purposes of § 4, to permit recovery from B, even though his cooperation was essential to the combination and even though had a third party been injured he could have recovered from either A or B, or from both. A, the moving force, should not be rewarded for his efforts to further an unlawful price arrangement and in effect to take from B the profits, trebled, that B made by selling the products of A's competitor. B was unwilling to enter the illegal scheme, was motivated principally by what he thought was economic necessity—the need to avoid losing business by being unable to offer a major product line—and would have been only marginally deterred by the prospect of antitrust liability.

In the third case, where D and E are competitors, if D simply proves the agreement and the resulting loss, should he recover from E, absent some believable showing that E was the more responsible for the illegal scheme? No doubt E was a substantial factor in the combination and hence in the injury; a judgment for damages might deter him and others from violating the law. But D is equally responsible for his own damages. To permit him a recovery may be a counter-deterrent. By assuring him illegal profits if the agreement in restraint of trade succeeds, and treble damages if it fails, it may encourage what the Act was designed to prevent. In this situation, it is doubtful that the ends of § 4 would be measurably served by permitting D's recovery. If judge or jury finds the parties equally responsible for the conduct which caused injury, D's recovery under § 4 should be denied for failure of proof that E was the more substantial cause of the injury.

No simple formula can encompass the infinite variety of possible situations. Generally speaking, however, I

would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them but permit recovery in favor of the one least responsible where one is more responsible than the other. This rule would simply pose the issue of causation in particularized form. There will be little mystery as to what evidence would be relevant proof: facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal under § 1; proof of whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; facts showing who ultimately profited or suffered from the arrangement.

As I view the record in the case before us, the evidence is insufficient to show that petitioners were as responsible as respondents, or more so, for the admittedly illegal scheme. The evidence before us does not suggest that petitioners were equal partners with respondents with respect to the origin and implementation of this scheme for distributing respondents' mufflers, or in terms of benefits from the scheme. In such circumstances summary judgment for respondents was improper.

SUPREME COURT OF THE UNITED STATES

No. 733.—October Term, 1967.

Perma Life Mufflers, Inc. et al., Petitioners, *v.* International Parts Corp. et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 10, 1968.]

Mr. Justice Fortas, concurring in the result.

I agree with the result in this case. Petitioners' right to recover in their own interest and as "private attorneys general" to enforce the antitrust laws cannot be denied on the basis of the doctrine of *in pari delicto*. *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1962).

The doctrine has, however, a significant if limited role in private antitrust law. If the fault of the parties is reasonably within the same scale—if the "delicto" is approximately "pari"—then the doctrine should bar recovery. This might be the case, for example, if a manufacturer of mufflers and a manufacturer of other parts had combined to formulate and operate a collusive scheme. One co-adventurer could not sue the other for discriminatory or restrictive practices which allegedly diminished its take from the enterprise.

But equality of position of this general nature is necessary before *in pari delicto* may apply to bar a remedy under antitrust. Unless the doctrine is so limited, the private remedy provided by the antitrust laws is nullified to a significant extent. The owner of a gas station may enter into an arrangement with the distributor and may benefit from its restrictive provisions. But this less-than-equal participation in the crime must not bar it from recovering in its own and the public interest if it can show that it has suffered compensable harm. Our deci-

sion in *Simpson* indicates this quite clearly. The antitrust laws are intended to protect individuals "from combinations fashioned by others and offered to (them) . . . as the only feasible method by which (they) may do business." *Ring* v. *Spina,* 148 F. 2d 647, 653 (1945).

As the Court points out, it is possible that the franchisee may be proved to be a collaborator, or co-adventurer, or a true *particeps criminis* with respect *to a particular aspect* of the plan—for example, if he *originated and insisted* upon the inclusion of a territorial exclusivity clause which was not in the franchise as drafted by the franchisor. He could not recover damages based upon this, if, essentially, it is his own act.

Clearly, petitioners here are not co-adventurers or partners in the franchise arrangement as a whole, and they are not barred by *in pari delicto.* On remand, as the Court orders, if petitioners are chargeable with responsibility for a particular clause of the agreement or restrictive covenant because it is, in substance, their own act, they should not be allowed to recover for injury they may have suffered because of it.

SUPREME COURT OF THE UNITED STATES

No. 733.—OCTOBER TERM, 1967.

Perma Life Mufflers, Inc. et al., Petitioners, v. International Parts Corp., et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 10, 1968.]

MR. JUSTICE MARSHALL, concurring in the result.

While I agree with the result and much of the reasoning in the opinion of the Court in this case, I find myself unable to accept what I take to be the holding that the doctrine of *in pari delicto* has no place in a treble damage antitrust action. Not only is it unnecessary to pass on such a broad proposition on the facts of this case, as the Court's opinion reveals, but the holding itself is, in my opinion, incorrect.

I agree that the "complex scope, contents, and effects" of the doctrine as it has grown up in the common law should not be applied mechanically to private antitrust actions under the relevant federal statutes. On the other hand, I believe that a limited application of the basic principle behind the doctrine of *pari delicto* is both proper and desirable in the antitrust field. As the Court notes, *ante*, p. 4, the literal meaning of *in pari delicto* is of equal fault. I would hold that where a defendant in a private antitrust suit can show that the plaintiff actively participated in the formation and implementation of an illegal scheme, and is substantially equally at fault, the plaintiff should be barred from imposing liability on the defendant.

Such an approach would still require reversal of the decision of the Court of Appeals in this case. As this Court's opinion makes perfectly clear, the mere fact that

a party enters into an agreement containing provisions that are violative of the antitrust laws with the intent to make money by operating under the agreement is not in itself sufficient to show that he is equally responsible for the existence of the illegal provisions. *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1962). Furthermore, the Court is certainly correct in concluding that the record is replete with evidence, relating to the tying and exclusive dealing provisions of the franchise agreement, which indicates, with sufficient probative force to withstand respondent's motion for summary judgment, that the petitioners did not actively seek out or support all the anticompetitive restraints embodied in the franchise.

However, the inquiry should not stop here. The franchise agreement also contains provisions requiring both resale price maintenance and the observance of territorial restrictions on sales by franchisees. Both of these sets of restrictions are ones which, at least on their face, would ordinarily be expected to benefit the franchisees more than Midas. Both restrict competition between franchisees, not between Midas and other suppliers competing to sell parts to Midas franchisees. If Midas can make an adequate showing that those provisions were inserted into the franchise agreement at the behest and for the benefit of petitioners and their fellow franchisees, petitioners should, in my opinion, be barred from contending that they were damaged by the existence and enforcement of the provisions.

I agree with the Court that petitioners should not be barred from recovering damages attributable to the enforcement of the tying and exclusive dealing provisions against them on the sole ground that they participated in the formulation of other anticompetitive provisions in the agreement. Cf. *Moore* v. *Mead Service Co.*, 340 U. S. 944 (1951), reversing 184 F. 2d 338 (C. A. 10th Cir. 1950). However, if Midas could show, which it has

quite clearly not done at this stage of the litigation, that petitioners actually participated in the formulation of the entire agreement, trading off anticompetitive restraints on their own freedom of action (such as the tying and exclusive dealing provisions) for anticompetitive restraints intended for their benefit (such as resale price maintenance or exclusive territories), petitioners should be barred from seeking damages as to the agreement as a whole.

It may be argued that the course I propose unduly complicates private antitrust litigation. A holding that a party who voluntarily enters into an agreement containing provisions that violate the antitrust laws is barred from any recovery on that agreement altogether (as the Court of Appeals has held here) or, at the other extreme, is absolutely free to recover any damages that he can show to stem from his operations under the agreement (as this Court's opinion seems to hold) would presumably be considerably easier to apply in most cases. It seems to me, however, that neither holding would represent a satisfactory resolution of the difficult problems concerning the administration of the antitrust laws raised by agreements such as the one involved in the present case.

The reasons for rejecting the approach taken by the Court of Appeals are, as I have said, persuasively set forth in the opinion of the Court. The reasons I see for rejecting the approach taken by this Court are, perhaps, less related to the public interest in eliminating all forms of anticompetitive business conduct and more related to the equities as between the parties. The principle that a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental in our jurisprudence. The traditional doctrine of *in pari delicto* is itself firmly based on this principle. I nevertheless agree, because of the strong public interest in eliminating restraints on competition, that many of the refinements

of moral worth demanded of plaintiffs by such traditional legal and equitable doctrines as *volenti non fit injuria,* unclean hands, and many of the variations of *in pari delicto* should not be applicable in the antitrust field. However, I cannot agree that the public interest requires that a plaintiff who has actively sought to bring about illegal restraints on competition for his own benefit be permitted to demand redress—in the form of treble damages—from a partner who is no more responsible for the existence of the illegality than the plaintiff.

The possible added deterrence to violations of the antitrust laws that would be produced by the Court's holding may well be equaled, if not surpassed, by the new incentive it will create to commit such violations, for a potential violator will have less to lose if he can attempt to recover his losses from his partner should the scheme not work out to his benefit.

The Court's opinion appears to seek to minimize the consequences of doing away with the *in pari delicto* defense by suggesting that a defendant will be able to have the "beneficial byproducts of a restriction" (*ante,* p. 6) to the plaintiff taken into account in the computation of damages. This, of course, is to some extent already true in any antitrust case. Illegal conduct does not *per se* result in a money judgment for a plaintiff; injury must always be shown. However, a defendant might also be permitted to show that the plaintiff's financial rewards from some of the illegal provisions of an agreement outweighed the harm suffered from other illegal provisions, and accordingly on some sort of offset theory the plaintiff would recover nothing.

If such an offset approach on the issue of damages is envisioned by the Court, it hardly seems an adequate means of preventing unjust enrichment. First, that approach clearly permits damages to be awarded when injury is shown to outweigh benefit regardless of the

nature of the plaintiff's participation in the scheme. Second, it adds an unnecessarily speculative element to the factual inquiry required in an antitrust case. While a trier of fact may have some difficulty in allocating responsibility between the parties to an agreement, the allocation can be made for the most part on the basis of hard evidence as to the facts surrounding the making of the agreement. The determination of damages in an antitrust suit, however, almost invariably requires a certain amount of speculation, no matter how informed. Cf. *Bigelow* v. *RKO Pictures, Inc.*, 327 U. S. 251, 264–266 (1946). Such speculation is ordinarily unavoidable if damages are to be provable. Here there is no necessity for permitting additional speculation as to offsetting benefits in order to prevent unjust enrichment because the same goal can be achieved by a factual evaluation of the parties' respective fault.

For example, it is obviously much easier to determine in this case whether petitioners actively participated in the formulation and implementation of the various illegal provisions of the franchise agreement than it is to decide whether the monetary benefits that petitioners obtained through the resale price maintenance and exclusive territorial provisions surpassed the losses they suffered from the exclusive dealing and tying arrangements. Since I regard a respective fault approach as superior to a damage offset approach on principle, the complications inherent in the latter inquiry merely reinforce my conviction that the Court is being unwise in broadly rejecting the doctrine of *in pari delicto*.

SUPREME COURT OF THE UNITED STATES

No. 733.—October Term, 1967.

Perma Life Mufflers, Inc. et al., Petitioners, v. International Parts Corp. et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 10, 1968.]

Mr. Justice Harlan, with whom Mr. Justice Stewart joins, concurring in part and dissenting in part.

The variety of views this case has engendered seems to me to stem from lack of agreement on a definition of the term *"in pari delicto,"* as well as a disagreement, perhaps, on the standards that should govern the use of the defense to which that term is properly applied. I believe that the courts below misused the term, but that properly used it refers to a defense that should be permitted in antitrust cases. Consequently, I would remand this case not for immediate trial but for fresh consideration of the motion for summary judgment upon proper standards.

Plaintiffs who are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant.[1] If the law is the Sherman Act, both are, in principle, liable equally to criminal prosecution. For example, two manufacturers who agree on a price at which they will sell are "of equal fault," as are a manufacturer and a dealer who strike a bargain whereby each accepts an illegal restriction that benefits the other.

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[1] This is at least the traditional use of the term. See, *e. g.*, *Williams* v. *Hedley*, 8 East. 378, 381–382, 103 Eng. Rep. 388, 389. See generally Note, In Pari Delicto and Consent as Defenses in Private Antitrust Suits, 78 Harv. L. Rev. 1241, distinguishing the two defenses. The present case is as good an illustration as any of the usefulness of maintaining distinct terms for the distinct situations properly characterized by *"in pari delicto,"* "consent," "unclean hands," and so forth.

When a person suffers losses as a result of activities the law forbade *him* to engage in, I see no reason why the law should award him treble damages from his fellow offenders. It seems to me a bizarre way to "further the overriding public policy in favor of competition," *ante*, p. 5, to pay violators three times their losses in doing what public policy seeks to deter them from doing. Even if the threat of intra-conspiracy treble damages had some deterrent effect, however, I should not think it a too "fastidious regard for the moral worth of the parties," *ibid.*, to decline to sanction a kind of antitrust enforcement that rests upon a principle of well-compensated dishonor among thieves.

There are, however, three situations quite distinct from that to which I think the term *in pari delicto* is properly applied. The first is the "consent" situation in which the Latin maxim "*volenti non fit injuria*" is sometimes invoked. Where X and Y conspire to fix prices at which they will sell, they are *in pari delicto*. If Z, *knowing of the conspiracy*, nevertheless purchases from X, he is not *in pari delicto*. He has committed no offense: the most that can be said is that he knowingly allowed an offense to be committed against him. I would agree, for many of the reasons stated in the opinions of MR. JUSTICE BLACK, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL, that there should be no defense in such a situation, where the plaintiff has done nothing the law told him not to do.

A second situation distinguishable from true *in pari delicto* is illustrated by *Kiefer-Stewart* v. *Seagram & Sons*, 340 U. S. 211, relied on by the Court. It was there alleged in defense to a treble-damage action that the defendants' illegal actions were taken in reprisal against altogether independent illegal actions by the plaintiff. Here again, I accept the decision that this is no defense. Our law frowns on vigilante justice. Since the plaintiff is in part enforcing the public interest against the defendants' violations, I would permit him to do so, and

leave punishment for any independent violation by him to proper means of enforcement.

The third distinguishable situation may or may not be illustrated by *Simpson* v. *Union Oil Co.*, 377 U. S. 13, and *Albrecht* v. *Herald Co.*, 390 U. S. 145, two cases that I find it quite difficult to understand.[2] In each of them, the plaintiff had been offered a dealership, on terms that he did not participate in formulating, and in each case he at first "accepted" such a dealership. Since neither case stated satisfactorily where the alleged combination in restraint of trade was to be found, it is not clear whether the plaintiff's acceptance of a dealership was itself a forbidden act. If it was not, then these cases fall under the heading of "consent" cases. A person who engaged in a lawful business on the terms offered should not be prevented from suing merely by his knowledge that others violated the law in contriving those terms. If, however, those plaintiffs were doing something the law told them not to do, I suggest that recovery in those cases can best be understood on the theory of a "coercion" exception to the *in pari delicto* doctrine. That is, although a large business with the power to dictate terms and a small business that can only accept them or cease doing business may both, in principle, be liable to legal sanctions for the contract that results from the offer and acceptance, it is considered that the liability is not "*pari*," and that the business accepting dictation is only minimally blameworthy.

In my view, the District Court and the Court of Appeals did not apply the true *in pari delicto* standard to this case. The District Court said that "each plaintiff voluntarily entered into the franchise agreements and accepted the benefits therefrom. They are . . . [therefore?] *in pari delicto* with defentants . . . ."[3] At an-

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[2] See my dissenting opinion in *Albrecht*, 390 U. S., at 156.

[3] 1966 Trade Cases 82, 705.

other point the court said, "We have repeatedly held that a person who freely assents to an act suffers 'no legal injury' if harm results therefrom." [4] Although the District Court made a passing distinction of the "coercion" and "unclean hands" doctrines, it is not clear that it meant to hold that the violation of the Sherman Act, if any, was one for which plaintiffs were subject to public-law sanctions along with the defendants.

The Court of Appeals decision was similar. That court relied on the District Court's language quoted above, adding that each of the plaintiffs had made a substantial profit from selling auto parts, a fact that might bear on the measure of any damages but which, apart from illegal action on the part of the plaintiffs, should not afford an absolute defense.[5]

It is by no means clear on this record, however, that the plaintiffs may not be said to have been *in pari delicto* in the proper sense of that term. This question is rendered more difficult by the complexity of the record history of plaintiffs' activities, and by the formidable obscurity of the law of dealer liability for vertical restraints, an obscurity fostered by *Simpson, supra, Albrecht, supra,* and above all by *United States* v. *Parke Davis,* 362 U. S. 29. Although I make no attempt to drain the bog at this point, I am of the view that before this case goes to trial the lower courts should be given another opportunity to consider the *in pari delicto* defense. I would remand this case to determine whether any agreement alleged to be in restraint of trade was one for which the plaintiffs were substantially as much responsible, and as much legally liable, as the defendants. I would permit the lower courts to consider this question upon the existing affidavits and such additional material as either side may wish to adduce.

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[4] *Id.*, at 82, 706.

[5] See 376 F. 2d 692, at 693, 695.